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The President

National Hispanic-Serving Institutions Week, 2023

By the President of the United States of America

A Proclamation

Education beyond high school should be a ticket to the middle class—and across our Nation, more than 500 Hispanic-Serving Institutions have helped to make that promise real, opening the doors of opportunity a bit wider for generations of Hispanic college students. During National Hispanic-Serving Institutions Week, we celebrate their important work.

Today's students are part of the most talented, resilient, and diverse generation in our history. But while creativity and work ethic are abundant, not everyone has an equal shot yet. That is why Hispanic-Serving Institutions are so essential. Two-thirds of all Hispanic college students in America attend one; they provide a quality education and empower underserved students—including Dreamers and first-generation college students—to earn degrees and build better lives for their families. And with the Supreme Court's recent decision to effectively end affirmative action, their work is as critical as ever.

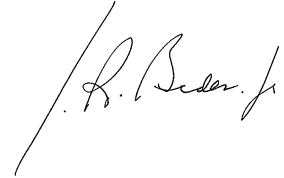
My Administration is committed to strengthening these vital institutions and supporting their students through graduation and beyond. The American Rescue Plan invested \$11 billion in Hispanic-Serving Institutions—the largest investment in Hispanic college students in our Nation's history. And through our White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics, we are working together to support Hispanic and Latino college students and invest in the future of Hispanic and Latino communities.

We have also increased Pell Grants for low-income families by the largest amount in over a decade, easing the overwhelming cost of college for about half of all Hispanic undergraduates. We fixed the Public Service Loan Forgiveness program so borrowers who become teachers, police officers, social workers, military service members and other public servants get the debt relief they are entitled to under the law. We are reducing the amount that student loan borrowers have to repay on their undergraduate loans to 5 percent of their discretionary income each month, down from 10 percent—the most generous repayment program ever. That is going to save the typical borrower around \$1,000 a year. And last year, I introduced the most ambitious student debt relief plan ever, which was on the verge of helping more than 40 million Americans. When the Supreme Court wrongly struck down that plan, we moved immediately to open an alternative path to relief that could further reduce costs for many Hispanic borrowers. No administration has fought harder for student debt relief than mine—and we are not done yet.

This week, I am thinking about Julieta García, the first Hispanic woman in history to serve as president of an American college. Last year, I had the honor of giving her the Presidential Medal of Freedom for her work building a culture of excellence, affirmation, and curiosity for generations of students. Reflecting on her career, she once said, “My job was always to thrust open the doors of opportunity.” That is what Hispanic-Serving Institutions do—and that is what America is all about: widening the aperture of opportunity for everyone.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 10 through September 16, 2023, as National Hispanic-Serving Institutions Week. I call on public officials, educators, and all the people of the United States to observe this week with appropriate programs, ceremonies, and activities that acknowledge the many ways these institutions and their graduates contribute to our country.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10620 of September 8, 2023

National Grandparents Day, 2023

By the President of the United States of America

A Proclamation

On National Grandparents Day, we give thanks to grandparents, who are the heart and soul of so many families.

Offering wisdom, sharing their own stories of courage and resilience, or leading us forward by the power of their example, grandparents define who we are and shape who we become. The First Lady and I were blessed with loving grandparents, and our grandchildren are the love of our lives and the life of our love.

For many families, grandparents are the glue holding everyone together. They drive their grandchildren to school and babysit when parents are busy. Sometimes, they become primary caregivers, giving children a stable home and loving role model. Grandparents give advice to young parents, pass on timeless family stories to younger generations, and open their hearts and homes for the people they love. I will never forget when my own grandpop took my family in when my father lost his job. My grandpop was a true example of what makes grandparents so special.

My Administration is working to respect the dignity of our grandparents and seniors. Through our Inflation Reduction Act, Medicare now has the authority to negotiate for lower prescription drug prices. Seniors on Medicare who used to pay as much as \$400 a month for insulin are now paying \$35 a month. In 2025, we are capping out-of-pocket spending on prescription drugs at the pharmacy at \$2,000 annually for those on Medicare, making it easier to afford medication. My proposed budget will extend the Medicare trust fund for at least 25 years, preserving essential programs that Americans have counted on for generations. And as I have promised, I will continue fighting to protect Social Security and Medicare and will not agree to any cuts to either program.

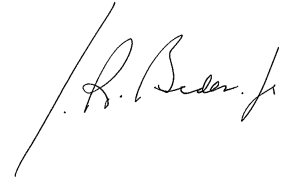
On this occasion, my Administration reaffirms our commitment to looking after our Nation's grandparents, especially those who care for children. Last year, the Department of Health and Human Services released the first National Strategy to Support Family Caregivers. This plan outlines nearly 350 actions the Federal Government can take to support the health, well-being, and financial security of family caregivers, including the 2.7 million grandparents who serve as caregivers for children each year. Additionally, I signed an Executive Order directing Federal agencies to increase support of family caregivers and provide more care options for people with disabilities and their families. The American Rescue Plan provided \$145 million to deliver counseling, training, and short-term relief to grandparents and other care providers. And for grandparents looking to share their love, the AmeriCorps Seniors Foster Grandparent program provides seniors with the opportunity to mentor young people in their communities.

Whether your grandparents called this country home from the moment they were born or came from distant shores, they have worked hard to give their children and their grandchildren a more prosperous future. In our hearts, we carry the lessons our grandparents instilled in us. And in ways big and small, we strive to build a future worthy of their highest hopes.

On National Grandparents Day, we give thanks to our grandparents for their unconditional love and unmatched inspiration.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 10, 2023, as National Grandparents Day. I call upon all Americans to celebrate the important role that grandparents play in the lives of their families and the children and grandchildren they love.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Presidential Documents

Proclamation 10621 of September 8, 2023

World Suicide Prevention Day, 2023

By the President of the United States of America

A Proclamation

On World Suicide Prevention Day, we hold all those affected by suicide close in our hearts—the Americans we have lost to this public health problem, the loved ones who mourn their heart-wrenching losses, and all the families and professionals working to support those in crisis. Though we recognize there is no single cause or single solution to suicide, we know that access to support and treatment can save lives. My Administration remains committed to expanding suicide prevention programs to reach every community in our Nation and ensuring all Americans can receive the care and support they deserve.

My Administration is working to tackle the mental health crisis, including by addressing the many risk factors associated with suicide—it is a core pillar of my Unity Agenda and one of the big challenges we as a society can overcome together. We have laid out a strategy to transform how mental health is understood, accessed, treated, and integrated in and out of health care settings. Our goals are to strengthen the mental health system's capacity, connect more Americans to care, and create healthy environments that strengthen mental health.

In 2021, more than 48,000 Americans were lost to suicide, over 12.3 million adults seriously considered suicide, and 1.7 million people attempted suicide. Suicide is the second leading cause of death among youth and young adults between the ages of 10 and 24 years old. And the suicide rate for veterans was more than 50 percent greater than for non-veteran adults. Yet despite the fact that so many Americans struggle with their mental health, treatment is often too expensive or inaccessible.

In 2021, less than half of all adults with mental illness received care for it. For children, the numbers are even worse. Nearly 70 percent of our kids who seek care for mental health or substance use cannot get it. Parents, teachers, school nurses, and counselors are telling us there is a serious youth mental health crisis happening right now in this country. But insurers still make it far too difficult to get mental health care. With too few mental health providers in their plan's network, patients with private insurance are often forced to seek out-of-network care at significantly higher costs, if they can find it.

Recently, my Administration proposed new steps to meaningfully expand access to mental health care in America, including requiring health insurance plans to identify gaps in the mental health care that they provide and to fix them. Under this plan, insurers would have to measure how often they require prior authorization for mental health care treatment and how often they deny those requests.

I have heard the despair from families everywhere, watching their spouse's, child's, or loved one's light dim, knowing they need help but lacking the means to get it. This sense of helplessness strips families of their confidence and dignity. Health insurers should cover mental health crises the same way they would cover treatment for a broken bone or any other physical health condition. Since I took office, my Administration has been fighting to make that a reality.

Our American Rescue Plan delivered nearly \$5 billion to expand Federal and State mental health and substance use services. Last year, when we passed the Nation's first major gun safety law in nearly three decades, we added measures to further expand the number of school psychologists and counselors available to our kids, make it easier for schools to use Medicaid to deliver mental health services, and increase the number of Certified Community Behavioral Health Clinics that deliver 24/7 care.

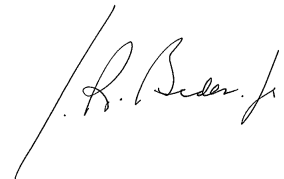
We have also launched 988, the National Suicide and Crisis Lifeline, which connects those experiencing a mental health crisis to a trained crisis counselor right away. And we established the National Maternal Mental Health Hotline to help mothers navigate mental health issues that can be reached by dialing 1-833-TLC-MAMA (1-833-852-6262). And to those experiencing emotional distress or thoughts of suicide: Please know that you are loved and that there is hope. I encourage you to call or text 988 for free, confidential support.

We are also investing in mental health care and suicide prevention efforts for service members and veterans to better honor our sacred obligation to the troops we send into harm's way by caring for them and their families when they return. We are hiring more mental health professionals and investing in programs that recruit veterans to help others get the support they need. We are working to expand rental assistance and job placement programs for our veterans to help reduce financial strain. And to help our first responders heal from any trauma they faced on the job, I have also signed laws that extend counseling, benefits, and other mental health resources.

As the world joins together to honor the memories of those we lost to suicide and their loved ones, may we recommit to ensuring that help and support are accessible and affordable to every American.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 10, 2023, as World Suicide Prevention Day. I call upon all Americans, communities, organizations, and levels of government to join me in creating hope through action and committing to preventing suicide across America.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.

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Presidential Documents

Proclamation 10622 of September 8, 2023

Patriot Day and National Day of Service and Remembrance, 2023

By the President of the United States of America

A Proclamation

Today we remember all the heroes who were forged in the hours, days, and years that followed that terrible morning of September 11, 2001—ordinary Americans who, amidst the terror, smoke, and flames, demonstrated extraordinary courage and selflessness. Together, their bravery helped prove to our Nation and the world that what those terrorists most hoped to wound could never be broken: the character of our Nation.

In the crucible that was September 11th, we saw just how deep that character goes. We saw it in the civilians, service members, and first responders who leapt into action that day, running into the searing flames and crumbling buildings—risking and losing their own lives to save others. We saw it in the incredible courage and resolve of the passengers on board Flight 93, who refused to let their plane be used as a weapon against more innocent Americans. We saw it in the police officers and firefighters who returned to the twisted steel and broken concrete slabs of Ground Zero and the Pentagon for months—breathing in toxins and ash that would damage their own health but nonetheless refusing to stop searching through the destruction. And we saw it in the millions of Americans across our country who responded to the September 11th attacks by signing up to defend our Constitution and join the greatest fighting force in the history of the world.

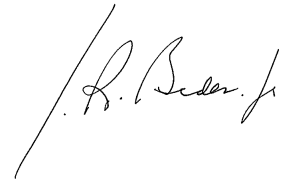
In the years since September 11th, hundreds of thousands of American troops have served—and sacrificed—around the world to deny terrorists safe haven and protect the American people. The First Lady and I hold in our hearts all those whose loved ones gave their last full measure of devotion in this fight. We owe them—and all our veterans and Gold Star Families as well as their survivors, caregivers, and loved ones—a debt of gratitude. While we can never fully repay that debt, we will never fail to meet our sacred obligation: to prepare and equip all those we send into harm's way and care for them and their families when they return.

In honor of all the lives we lost 22 years ago—and in honor of all the heroes who have given their whole souls to the cause of this Nation every moment since—may today not only be observed with solemn remembrance but also with renewal and resolve. And I invite all Americans to observe this day with service; you can find opportunities to volunteer in your community by visiting americorps.gov/911-day. Together, may we continue to demonstrate that the rights and freedoms that those terrorists sought to destroy on September 11, 2001, remain unwavering—strengthened by generations of Americans who have dared all and risked all to defend, protect, and preserve our democracy.

By a joint resolution approved December 18, 2001 (Public Law 107–89), the Congress has designated September 11 of each year as “Patriot Day,” and by Public Law 111–13, approved April 21, 2009, the Congress has requested the observance of September 11 as an annually recognized “National Day of Service and Remembrance.”

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, do hereby proclaim September 11, 2023, as Patriot Day and National Day of Service and Remembrance. I call upon all departments, agencies, and instrumentalities of the United States to display the flag of the United States at half-staff on Patriot Day and National Day of Service and Remembrance in honor of the individuals who lost their lives on September 11, 2001. I invite the Governors of the United States and its Territories and interested organizations and individuals to join in this observance. I call upon the people of the United States to participate in community service in honor of those our Nation lost, to observe this day with appropriate ceremonies and activities, including remembrance services, and to observe a moment of silence beginning at 8:46 a.m. eastern daylight time to honor the innocent victims who perished as a result of the terrorist attacks on September 11, 2001.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of September, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.

A handwritten signature in dark ink, appearing to read "Joe Biden", with a long, sweeping horizontal line extending to the left.

Rules and Regulations

Federal Register

Vol. 88, No. 176

Wednesday, September 13, 2023

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Parts 201, 202, and 206

[Doc. No. AMS–LRRS–23–0014]

Nomenclature Change; Technical Amendment

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; technical amendment.

SUMMARY: This rule updates obsolete nomenclature in the regulations under the Packers and Stockyards Act, 1921 (Act). Obsolete references to the Grain Inspection, Packers and Stockyards Administration (GIPSA) are changed to the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA). References to Packers and Stockyards Programs, Packers and Stockyards Administration, and other obsolete terms are likewise changed to reflect the USDA's, AMS's, and the Packers and Stockyards Division's current organizational structure. Administration of Packers and Stockyards (P&S) activities under the Act was transferred to AMS in 2017.

DATES: Effective September 13, 2023.

FOR FURTHER INFORMATION CONTACT: Laurel L. May, Regulatory Analyst, Agricultural Marketing Service, USDA; telephone: (202) 384–2975 or email: Laurel.May@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule makes technical amendments to regulations in the Code of Federal Regulations (CFR). Parts 201, 202, and 206 of Title 9 of the CFR contains regulations that effectuate the Act (7 U.S.C. 181 *et seq.*). Several references in parts 201 and 206 reflect administration of P&S activities under GIPSA prior to a USDA reorganization in 2017, at which time those activities were transferred to AMS. *See* 83 FR 61309; November 29, 2018.

AMS published a final rule on August 30, 2019 (84 FR 45644), to update the regulations to reflect the transfer to AMS. However, some of the necessary changes to the regulations were inadvertently omitted. For example, the term *Administration* or *agency* at 7 CFR 201.2(d) is currently defined as the Grain Inspection, Packers and Stockyards Administration (Packers and Stockyards Programs). This rule revises the definition of *Administration* or *Agency* in § 201.2(d) to mean the Agricultural Marketing Service.

This rule makes similar changes to nomenclature in the regulations to reflect AMS organizational structure. P&S activities are currently conducted by the Packers and Stockyards Division (PSD) of AMS's Fair Trade Practices Program. PSD regional offices are managed by Regional Directors. Thus, technical amendments to the regulations in this final rule reference AMS, PSD, and Regional Directors. As well, references to forms used in P&S activities are updated to reflect current form numbers assigned by the Office of Management and Budget (OMB). For example, the monthly swine packer report required in § 206.3(c) is currently identified as Form P&SP 341. This rule revises § 206.3(c) to show the report's OMB reassignment as Form PSD 341.

Additionally, this rule corrects a typographical error in § 201.42(g), which provides that savings accounts for shippers' proceeds must be properly designated as a part—not “party”—of the custodial account of a market agency in its fiduciary capacity as trustee of trust funds.

This rule falls within a category of regulatory actions that OMB exempted from Executive Order 12866 review.

This final rule is limited to making nomenclature changes in conformance with USDA organizational structure. Thus, AMS has determined that this rule is not subject to the notice and comment requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553). Additionally, AMS has determined that there is good cause for making this technical amendment final without prior proposal and opportunity for comment because the revisions are not substantive and will have no impact on the regulatory requirements in the affected parts. AMS has determined that public comment on such administrative changes is unnecessary and that there is

good cause under the APA for proceeding with a final rule.

Further, because a notice of proposed rulemaking and opportunity for public comment are not required to be given for this rule under the APA or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, this rule is issued in final form.

In addition, there is good cause to make this rule effective in fewer than 30 days after publication in the **Federal Register** because the revisions are administrative in nature. Therefore, this final rule is effective upon publication.

List of Subjects

9 CFR Part 201

Confidential business information, Reporting and recordkeeping requirements, Stockyards, Surety bonds, Trade practices.

9 CFR Part 202

Administrative practice and procedure, Stockyards.

9 CFR Part 206

Government contracts, Reporting and recordkeeping requirements, Swine.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 9 CFR parts 201, 202, and 203 as follows:

PART 201—ADMINISTERING THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. In § 201.2, revise paragraphs (d) and (f) to read as follows:

§ 201.2 Terms defined.

* * * * *

(d) *Administration* or *agency* means the Agricultural Marketing Service.

* * * * *

(f) *Regional Director* means the Regional Director of the Packers and Stockyards Division (PSD) for a given region or any person authorized to act for the Regional Director.

* * * * *

§ 201.17 [Amended]

■ 3. In § 201.17 (a), remove the text “regional supervisor” and add in its place the text “Regional Director” wherever it appears.

§ 201.28 [Amended]

- 4. In § 201.28:
- a. In the section heading, remove the text “Regional Supervisors” and add in their place the text “Regional Directors”; and
- b. In the introductory paragraph, remove in both instances the text “Regional Supervisor” and add in their places the text “Regional Director”.

§ 201.42 [Amended]

- 5. In § 201.42 (g), remove the word “party” and add in its place the word “part”.

§ 201.72 [Amended]

- 6. In § 201.72(b), remove the term “P&SP” and add in its place the term “PSD”.

§ 201.73–1 [Amended]

- 7. In § 201.73–1 introductory paragraph:
- a. Remove the text “P&SA Form 215” and add in its place the text “Form PSD 4000”; and
- b. Remove in both instances the text “Packers and Stockyards Programs” and add in their places the text “Packers and Stockyards Division”.

§ 201.108–1 [Amended]

- 8. In § 201.108–1 introductory paragraph, remove in both instances the text “Grain Inspection, Packers and Stockyards Administration” and add in their places the text “Agricultural Marketing Service”.

PART 202—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE PACKERS AND STOCKYARDS ACT

- 9. The authority citation for part 202 continues to read as follows:

Authority: 7 U.S.C. 228(a); 7 CFR 2.22 and 2.81.

§ 202.2 [Amended]

- 10. In § 202.2(b), remove the text “Grain Inspection,”.

PART 206—SWINE CONTRACT LIBRARY

- 11. The authority citation for part 206 continues to read as follows:

Authority: 7 U.S.C. 198–198b; 7 U.S.C. 222.

§ 206.2 [Amended]

- 12. In § 206.2(e), remove the text “Form P&SP 342” and add in its place the text “Form PSD 342”.

§ 206.3 [Amended]

- 13. In § 206.3(c), remove the text “Form P&SP 341” and add in its place the text “Form PSD 341”.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–18350 Filed 9–12–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 23–10]

RIN 1515–AE80

Import Restrictions on Ethnological Material of Peru

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect the addition of several categories of ethnological material of Peru to the existing import restrictions and to clarify descriptions of certain categories of archaeological and ethnological material of Peru. The United States has entered into an agreement with Peru that supersedes the prior agreement and amends the import restrictions that became effective on June 9, 2022. The restrictions, originally imposed by Treasury Decision 97–50, and recently extended by CBP Decision 22–11 for an additional five-year period, will continue with the addition of these categories of ethnological material through June 9, 2027, and the CBP regulations are being amended to reflect these additions. The Designated List of archaeological and ethnological material of Peru to which the restrictions apply is reproduced below.

DATES: Effective September 13, 2023.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-trrculturalproperty@cbp.dhs.gov*. For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in § 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

In certain limited circumstances, the CPIA authorizes the imposition of restrictions on an emergency basis (19 U.S.C. 2603). The emergency restrictions are effective for no more than five years from the date of the State Party’s request and may be extended for three years where it is determined that the emergency condition continues to apply with respect to the covered material (19 U.S.C. 2603(c)(3)). These restrictions may also be continued pursuant to an agreement concluded within the meaning of the CPIA (19 U.S.C. 2603(c)(4)). Additionally, after any agreement enters into force either through an agreement or emergency action, CBP will by regulation promulgate (and when appropriate revise) a list of the archaeological or ethnological material of the State Party covered by the agreement or by such emergency action (19 U.S.C. 2604).

On May 7, 1990, the former United States Customs Service published Treasury Decision (T.D.) 90–37 amending 19 CFR 12.104g(b) to reflect the imposition of emergency restrictions on the importation of archaeological materials from the Sipán Archaeological Regions, forming part of the remains of the Moche culture. Subsequently, on June 27, 1994, the former United States Customs Service published T.D. 94–54, amending 19 CFR 12.104g(b) to reflect

the extension of these emergency import restrictions for an additional three-year period.

On June 9, 1997, the United States entered into the “Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Hispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru” (1997 MOU). The 1997 MOU provided for import restrictions on certain categories of archaeological and ethnological material and also continued to include archaeological material then subject to the emergency restrictions.

On June 11, 1997, the former United States Customs Service published T.D. 97–50 in the **Federal Register** (62 FR 31713), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions and included a list designating the types of archaeological and ethnological materials covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years.

The import restrictions were subsequently extended five times, and the designated list amended twice, in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a). On June 6, 2002, the former United States Customs Service published T.D. 02–30 in the **Federal Register** (67 FR 38877), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years. On June 6, 2007, CBP published CBP Decision (CBP Dec.) 07–27 in the **Federal Register** (72 FR 31176), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years. On June 7, 2012, CBP published CBP Dec. 12–11 in the **Federal Register** (77 FR 33624), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years. On June 7, 2017, CBP published CBP Dec. 17–03 in the **Federal Register** (82 FR 26340), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of

five years and to revise the designated list to reflect the addition of Colonial period documents and manuscripts to the list of ethnological material.

On September 13, 2021, the United States Department of State proposed in the **Federal Register** (86 FR 50931), to extend the 1997 MOU. On March 15, 2022, after consultation with and recommendation by the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the determinations necessary to extend and amend the 1997 MOU. The extension and amendment of the MOU was implemented in two stages. First, the 1997 MOU was extended for an additional five years via an exchange of diplomatic notes, with effect from June 9, 2022. On June 9, 2022, CBP published CBP Dec. 22–11 in the **Federal Register** (87 FR 34775), which amended 19 CFR 12.104g(a) to reflect the extension of these import restrictions for an additional period of five years.

Second, on September 30, 2022, the Governments of the United States and Peru signed an agreement to include additional categories of ethnographic materials, titled “Agreement Between the Government of The United States of America and the Government of The Republic of Peru Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Peru” (2022 Agreement). The 2022 Agreement supersedes the 1997 MOU. Following an exchange of diplomatic notes, the 2022 Agreement entered into force on April 27, 2023. Pursuant to the 2022 Agreement, the existing import restrictions on archaeological and ethnological materials remain in effect through June 9, 2027, and the importation of additional categories of ethnological material is restricted through June 9, 2027.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the amendment of the Designated List of cultural property, described in CBP Dec. 17–03, with the addition of certain categories of ethnological material of Peru and clarification of descriptions of pre-Columbian pottery and textile styles, ecclesiastical objects, and prints to which the import restrictions apply. The restrictions on the importation of

archaeological and ethnological material will be in effect through June 9, 2027. Importation of such material of Peru, as described in the Designated List below, will be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions> by selecting the material for “Peru.”

Designated List of Archeological and Ethnological Material of Peru

The Designated List contained in CBP Dec. 17–03, is amended to add certain categories of ethnological material of Peru and to clarify descriptions of pre-Columbian pottery and textile styles, ecclesiastical objects, and prints to which the import restrictions apply. For the reader’s convenience, CBP is reproducing the Designated List contained in CBP Dec. 17–03 in its entirety with these changes. Note that the Designated List also subsumes those categories of Moche objects from the Sipán Archaeological Region of Peru for which import restrictions have been in place since 1990 (*see* T.D. 90–37).

The Designated List includes archaeological and ethnological materials. Archaeological material ranges in date from approximately 12,000 B.C. to A.D. 1532. Ethnological material dates to the Colonial period (A.D. 1532–1821) and includes objects directly related to the pre-Columbian past, ecclesiastical objects, and manuscripts and documents.

The list is divided into the following categories of objects:

- I. Archaeological Material
 - A. Pre-Columbian Textiles
 - B. Pre-Columbian Metals
 - C. Pre-Columbian Ceramics
 - D. Pre-Columbian Lithics
 - E. Pre-Columbian Perishable Remains
 - F. Pre-Columbian Human Remains
- II. Ethnological Material
 - A. Objects Directly Related to the Pre-Columbian Past
 - B. Ecclesiastical Objects
 - C. Colonial Manuscripts, Documents, and Prints

Approximate chronology used to describe cultural periods of Peru.

	Rowe	Lumbreras
A.D. 1532–1821	Colonial Period/Viceroyalty of Peru	
A.D. 1440–1532	Late Horizon	Inca Empire.
A.D. 1100–1440	Late Intermediate Period	Regional states and kingdoms.
A.D. 600–1100	Middle Horizon	Huari (Wari) Empire.

	Rowe	Lumbreras
200 B.C.–A.D. 600	Early Intermediate Period	Regional Cultures.
1000–200 B.C	Early Horizon	Middle and Late Formative.
1800–1000 B.C	Initial Period	Early Formative.
2500–1800 B.C	Late Pre-ceramic	Late Archaic.
4500–2500 B.C	Middle Pre-ceramic	Middle Archaic.
6000–4500 B.C	Early Pre-ceramic	Early Archaic.
12,000–6000 B.C	Early Pre-ceramic	Hunter-Gatherers.

I. Archaeological Material

A. Pre-Columbian Textiles

Examples of pre-Columbian textiles include, but are not limited to, the following:

1. Chimú
a. Pillows—Piece of cloth sewn into a bag shape and stuffed with cotton or plant fibers. Generally, the cloth is made in tapestry technique. Usually 60 cm. x 40 cm.

b. Painted Cloths—Flat cloth of cotton on which designs are painted. Range between 20 cm. and 6.1 m.

c. Headdresses—Headdresses are usually made of feathers, especially white, green, and dark brown, which are attached to cloth and fitted to a cane or basketry frame. Feathers on the upper part are arranged to stand upright.

d. Feather Cloths—Decorated with bird feathers, especially panels and tunics. They vary in shape and size; generally they depict geometric motifs and volutes. Vary from 20 cm.–3 m. in length, and may be up to 1.5 m. in width.

e. Panels—Chimú panels may be of two types: tapestry weave or plain-weave cotton. Isolated anthropomorphic designs predominate and may be associated with zoomorphic motifs. Vary from 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

f. Belts and Sashes—Generally made in tapestry technique, and predominantly of red, white, ocher, and black. As with other Chimú textiles, they generally depict human figures with rayed headdresses. Up to 2.20 m. in length.

2. Chancay

a. Looms—Commonly found in Chancay culture, sometimes with pieces of the textile still on the loom. Often these pieces of cloth show varied techniques and are referred to as “samples.” Usually 50 cm. x 20 cm.

b. Loincloths—Triangular panels of cloth with woven tapestry borders.

c. Dolls—Three dimensional human figures stuffed with plant fiber to which hair and other decorations are added. Sometimes they depict lone females; in other cases they are arranged in groups. Most importantly, the eyes are woven in tapestry technique; in fakes, they have

embroidered features. Usually 20 cm. tall and 8 cm. wide.

d. False Heads—In Chancay culture, false heads are made on a cotton or plant fiber cushion covered with plain-weave cloth, decorated with shells, beads, metal, wood, or painting to depict facial features. They sometimes have real hair. Usually 30 cm. x 35 cm.

e. Unkus/Tunics—Varied sizes and styles. Some are in plain weave, others in gauze, still others are in tapestry technique or brocade. They are recognized by their iconography such as geometric motifs, birds, fish, plants, and human figures. Miniatures are tiny; regular size examples are about 50 cm. x 50 cm.

f. Belts—Chancay belts are multicolored, with geometric motifs rendered in tapestry technique. Sometimes the ends are finished in faux-velour technique. Usually 2 m. x 5 cm.

g. Panels—Chancay panels may be made in tapestry technique or may be painted on plain weave cloth. In these latter cases, the panels may depict fish, parrots, monkeys, viscachas, felines, foxes, and human figures. Vary in size from miniatures to 4 m. x 2 m.

h. Standards—Chancay standards are supported on a frame of straight reeds covered with cotton cloth, which is painted in anthropomorphic designs in ochers and black. Sometimes they have a handle. Usually 20 cm. x 20 cm.

i. Gauzes—Pieces of cloth made in openwork gauze technique, with very fine cotton threads. May have embroidered designs in the same thread that depict birds or other flora and fauna. Usually 80 cm. x 80 cm.; some are smaller.

3. Nazca

a. Three-Dimensional Cloths—Figures of many bright colors needle-knitted into long strips. Motifs include, but are not limited to, birds, flowers, humans, and mythical figures. Each figure is approximately 5 cm. long x 2 cm. wide.

b. Unkus/Tunics—These include miniature and regular-sized tunics. They are generally of one color, mostly light brown. The neck edges, hem, and fringes have multicolored geometric designs. Fringes end in woven braids.

Vary in size from miniatures up to approximately 1.5 m. x 0.8 m.

c. Bags—There are bags of many sizes, from miniatures to large ones, generally with a narrow opening and a wide pouch. Some are decorated with fringe. Their iconography resembles the unku (tunic), stylized designs in yellow, red, and dark and light blue.

d. Sashes—Nazca sashes are made on special looms. Their ends are decorated with plied fringe.

e. Tie-Dye (Painted) Cloths—Most common are those made in the tie-dye technique, in which the textile is knotted and tied before it is dyed, so that when it is untied, there are negative images of diamonds, squares, and concentric dots. Most common are orange, red, blue, green, and yellow colors. Vary from approximately 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

f. Patchwork Cloths—Variant of the Tie-Dye cloth, in which little panels are made and later sewn together so that the resulting textile includes rectangles of tie-dyed panels of different colors. The cloth may have a decorative fringe. Vary from 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

g. Waras/Loincloths—Generally made of a flat piece of cloth with colorful borders depicting stylized geometric motifs. They terminate in fringe. Usually 50 cm. x 30 cm.

h. Fans—Feathers inserted into a plant fiber frame of twisted cords. Commonly two colors of feathers are attached, such as orange and green, or yellow and blue. Usually 30 cm. x 20 cm.

4. Huari (Wari)

a. Panels—Characterized by a complex and abstract iconography. Made in tapestry technique with a range of colors such as browns, beiges, yellows, reds, oranges, and greens. Vary from 20 cm. x 20 cm. to 2.0 m. x 1.8 m.

b. Unkus/Tunics—Large with abstract and geometric iconography. Commonly the designs repeat in vertical bands. Generally, tunics have a cotton warp and camelid fiber weft. Some are so finely woven that there are 100 threads per cm². Vary in size from miniatures up to 1.5 m. x 80 cm.

c. Caps—Most common are the “four-corner hats” made in a faux-velour technique that results in a velvety

texture. On the base cloth, small tufts of brightly-colored wool are inserted.

d. Vinchas/Headbands or Sashes—These garments are made in tapestry weave or faux-velour technique and depict geometric motifs.

e. Bags—Bags have an opening somewhat narrower than the body, with designs depicting felines, camelids, human faces, and faces with animal attributes.

5. Paracas

a. Esclavinas/Small Shoulder

Ponchos—Paracas esclavinas are unique for their decoration with brightly-colored images in Paracas style, such as birds, flowers, animals, and human figures. Vary in size from miniatures up to 60 cm. x 30 cm.

b. Mantles—Paracas mantles can be divided into five types, based on their decoration. All are approximately 2.5 m. x 1.6 m.

i. Mantles with a plain field and woven borders;

ii. Mantles with decorative (embroidered) borders and plain field;

iii. Mantles with decorative (embroidered) borders and a decorative stripe in the center field;

iv. Mantles with embroidered borders and center field embroidered in checkerboard-fashion;

v. Mantles with embroidered borders and alternating diagonals of embroidered figures in the center field.

c. Gauzes—Paracas gauzes are made of one color, such as lilac, yellow, red, or gray. They are generally rectangular and have a soft and delicate texture. Approximately 1 m. x 1 m.

d. Panels—Paracas panels are generally of cloth and may have been used for utilitarian purposes. They are generally undecorated. Vary from 20 cm. x 20 cm. to 2 m. x 1.8 m.

e. Skirts—Paracas skirts are of two types: some are plain, made of cotton with decoration reserved for the ends; there are others that are elaborately embroidered with colorful images rendered in wool. These often form sets with mantles and other garments. Skirts are rectangular and very wide, with two fringed ties. Usually 3 m. long and 70 cm. wide.

f. Waras/Loincloths—Made of cotton, not as large as skirts, and may have embroidered edges.

g. Slings—Paracas slings are decorated in Cavernas style, made of plant fiber, and are of small size, generally 1.5 m. x 5 cm.

h. Furs—There are numerous examples of animal skins reported from Paracas contexts, including, but not limited to, the skins of the fox, viscacha, and guinea pig. Most are poorly preserved.

6. Moche

a. Bags—Moche bags are usually square, small, and have a short handle. They are made in tapestry technique with brightly-woven designs. Principal colors used are white, black, red, light blue, and ocher.

b. Panels—Recognizable by their iconography, these tapestry-technique panels may show people on balsa-reed rafts surrounded by a retinue. They are rendered in a geometric fashion and are outlined in black and shown in profile. Scenes of marine life and fauna predominate. Vary from 20 cm. x 20 cm. to 2 m. x 1.8 m.

c. Ornamental Canes—Small canes are “woven” together in a twill technique using colorful threads that depict anthropomorphic designs. Approximately 10 cm. x 10 cm.

7. Lambayeque Panels—Lambayeque panels are small, made in tapestry technique, of cotton and wool. Vary from 20 cm. x 20 cm. to 2 m. x 1.8 m.

8. Inca

a. Slings—There are two types of Inca slings. Ceremonial slings are oversize and elaborately decorated with geometric motifs, with long fringes. Utilitarian slings are smaller and almost always with decoration only on the pouch and far ends. The decoration is geometric and the slings have fringed ends.

b. Unkus/Tunics—Inca tunics are well-made and colorful, mostly in red, olive green, black, and yellow. Decorative elements may be arrayed checkerboard fashion and are found on the upper and lower part of the garment. Vary in size from miniatures up to approximately 1.5 m. x 80 cm.

c. Bags—Recognized by their bright colors, they have an opening that is narrower than the body and a wide pouch with long fringe and handle. Vary in size from miniatures up to 30 cm. x 20 cm.

d. Panels—Some are made of cotton using the double-cloth technique, based on light brown and beige. Lines of geometrically-rendered llamas predominate. Vary in size from 20 cm. x 20 cm. to 2 m. x 1.8 m.

e. Mantles—Inca mantles are of standard dimensions, sometimes more than a meter long, generally rectangular. They are multi-colored and made of cotton warp and wool weft. Most common colors are dark red, olive green, white, and black. Generally 2.5 m. x 1.6 m.

f. Khipus/Quipus—Inca khipus (knotted string recording devices) are made of cotton and wool cords, sometimes with the two fibers plied together. Rarely is their original color preserved, though sometimes one sees

light blues and browns. Some are wrapped with colorful threads on the ends of the cords. 80 cm. x 50 cm.

9. Chiribaya Tunics, Bags, Panels, and Hats—Chiribaya textiles are mostly plain-weave warp-faced technique with complementary warps made with wool yarn in natural colors such as dark brown, black, white, and beige; and dyed yarn in red, green, or blue. The natural-colored yarns are usually weft yarns, and the dyed yarns appear as warp yarns. Designs include, but are not limited to, simple or alternating vertical stripes of varied widths with hook and rhombus designs, snakes, two-headed felines, and an anthropomorphic creature with human, cat, and lizard features.

10. Chuquibamba

a. Ponchos, Mantles, and Tunics—Chuquibamba ponchos and tunics are made of camelid fibers and decorated with tapestry and weft-patterned geometric patterns and figures inset in squares occurring in horizontally divided vertical stripes. Mantles and shawls may have fold lines and zones of different patterns. Designs typically are eight pointed stars, birds, snakes, cats, frogs, and llamas.

b. Loincloths—Small rectangular cloths with four ties on the longer sides. Designs are in patterned bands, and some have end borders or patterned bands in the center.

c. Belts—A long, narrow textile with ties at each end. Belts usually have a single-colored background with designs in a rectangular grid. Some belts are two layers of fabric seamed together to form a pouch with an opening in the upper side.

d. Bags—Large and small square or trapezoidal bags are created from a single rectangle of fabric, folded with seamed sides, with cords attached at the mouth, and sometimes the bottom corners, to form straps. May have lavish fringe hanging from the bottom edge. Finely woven tapestry or weft-pattern designs are typically in bands or within squares.

11. Sihuas

a. Mantles, Tunics, and Panels—Cotton and camelid fibers in highly varied weaving techniques such as warp-face, slit tapestry, cross-looping, and tubular edging. Designs include the Rayed Head, Step Platform, anthropomorphic, zoomorphic, and geometric designs, often with zig-zagging lines and borders. May have stripes of alternating colors. Designs may be woven or tie-dyed. Colors often are red, blue, green, and yellow. May have long fringes.

B. Pre-Columbian Metal Objects

Examples of pre-Columbian metal objects include, but are not limited to, the following:

1. Idols—Anthropomorphic or zoomorphic figures, some hollow and others solid. They may be made of gold and silver, they may be gilded, or of copper, or bronze. Sizes vary from 2 cm.–20 cm. in height.

2. Small Plaques—Thin sheets of gold, silver, copper, or gilded copper used to cover the body and made in pieces. They have repoussé or punched designs on the edge and middle of the sheet. Average 0.6 cm in height.

3. Axes—Almost always T-shaped and solid. There are also axes in a traditional axe-head shape. May be made of bronze or copper.

4. Mace Heads—These come in a great variety of shapes such as star-shaped, flat, or of two or three levels. They may be made of copper or bronze. Most have a central hole through which a wooden handle was affixed.

5. Musical Instruments

a. Trumpets—Wind instrument with a tubular body and flaring end, fastened at the joint. May be made of copper or bronze.

b. Bells—Of varying shapes and varying materials such as gold, silver, copper, or silver-plated copper.

c. Conos—Instrument shaped from a sheet of hammered metal, with or without a clapper. Commonly made of copper or silver. Up to 0.5 m. in height.

d. Rattles—Musical instrument with a central hole to accommodate a handle. May be made of copper or bronze. Vary from 6 cm.–25 cm. in height.

e. Jingle Bells—Spherical bells with an opening on the lower part and a handle on the upper part so they can be suspended from a sash or other garment. They contain a small stone or a little ball of metal. The handles may be decorated. Jingle bells may decorate another object, such as rhythm sticks, and may be of gold, silver, or bronze. Used in all pre-Columbian cultures of Peru.

f. Chalchachas—Instruments shaped like a bivalve with repoussé decoration. Made of copper.

g. Quenas (flutes)—Tubular instruments, generally made of silver, with perforations to vary the tone.

6. Knives—Knives vary depending on their provenance. They can have little or no decoration and can be of different metals or made of two metals. The best-known are the *tumis* from the Sicán culture, which have a straight or trapezoidal handle and a half-moon blade. The solid handle may have carved or stamped designs. Generally

made of gold, silver, or copper. In ceremonial examples, the blade and upper part may depict an anthropomorphic figure standing or seated, or simply a face or mask with an elaborate headdress, earspools, and inset semi-precious stones. Tumi handles can be triangular, rectangular, or trapezoidal, and blades can be ovaloid or shaped like a half-moon.

7. Pins—With a straight shaft and pointed end, pins can be flat or cylindrical in cross-section. Most are hammered, and some are hollow. They can be made of gold, silver, copper, bronze, gold-plated silver, or of two metals. Some pins are zoomorphic, others have floral images, and still others depict fish. Some have a round head; others have a flat, circular head; still others have the shape of a half-moon. There are hollow-headed rattle pins; others have solid anthropomorphic images. Most are up to 50 cm. in length, with heads that are up to 10 cm. in diameter. The small pins are about 5 cm. in length.

8. Vessels—There are a variety of metal vessels; they may be made of gold, silver, gilded silver, gilded copper, silver-covered copper, or bronze. There are miniatures, as well as full-size vessels. Such vessels are known from all cultures. Often formed as beakers, bowls, open plates, globular vessels, and stirrup-spout bottles. The exact form and surface decoration varies from culture to culture. Shapes include, but are not limited to beakers, bowls, and plates. Average 0.3 m.–0.5 m. in height.

9. [Reserved]

10. Masks—May be made of gold, silver, gilded silver, copper, gilded copper, silver-covered copper, or may be made of two metals. They vary greatly in shape and design. The best-known examples come from the following cultures: Moche, Sicán, Chimú, Huari (Wari), Inca, Nazca, and Chíncha. The northern coast examples often have insets of shell, precious or semi-precious stones, and may have plant resins to depict the eyes and teeth. Almost all examples that have not been cleaned have a surface coloring of red cinnabar. Examples from Sicán measure up to 49 cm. in width by 29 cm. in height. Miniature examples can measure 7 cm. x 5 cm. Miniature masks are also used as decorations on other objects. Copper examples generally show heavy oxidation.

11. Crowns—Thin or thick sheets of metal made to encircle the head. They may be made of silver, gold, copper, gilded silver, silver-covered copper, or may be made of two metals. Some examples have a curved central part and may be decorated with pieces of metal

and real or artificial feathers that are attached with small clamps. Found in all cultures.

12. Penachos (Stylized Metal Feathers)—Stylized metal feathers used to decorate crowns. May be made of gold, silver, copper, or silver-covered copper.

13. Tocados (Headdresses)—Headdress ornaments which may be simple or complex. They may be made of one part, or may include many pieces. Found in all cultures. They may take the form of crowns, diadems, or small crowns. They may have two stylized feathers to decorate the crown and to hold it to the hair (especially the Chimú examples). Paracas examples generally have rayed appendages, with pierced disks suspended from the ends of the rays.

14. Turbans—Long pieces of cloth that are wrapped around the head. Metal ornaments may be sewn on turbans. Found in all cultures; the metal decorations and the cloth vary from culture to culture.

15. Spoons—Utilitarian objects made of gold, silver, or copper.

16. Lime Spatulas—Miniature spatula: a straight handle has a slightly spoon-shaped end. The handle may have an anthropomorphic figure. Made of gold, silver, or copper.

17. Ear Spools—Ear spools are generally made of a large cylinder that fits through the earlobe with an even larger disk or decorative sheet on one side. The disk may be decorated with repoussé, stamped, or engraved designs, or may have inset stone or shell. May be made of gold, silver, copper, or made of two metals. Ear spools are found in all cultures. The largest measure up to 15 cm. height; typical diameter: 5 cm.–14 cm.

18. Nose Ornaments—Of varied shapes, nose ornaments can be as simple as a straight tube or as complex as a flat sheet with repoussé design. In the upper part, there are two points to attach the ornament to the septum. They may be of gold, silver, or copper, or may be made of two metals.

19. Earrings—Decoration to be suspended from the earlobes.

20. Rings—Simple bands with or without designs. Some are two bands united by filigree spirals. Some have inset stones. May be made of silver, gold, copper, or alloys.

21. Bracelets—Bracelets are made of sheets of metal, commonly in a straight or slightly trapezoidal shape, with stamped or repoussé designs. Some are simple, narrow bands. Found in all cultures and with varied designs. May be made of gold, silver, bronze, or alloys

of copper. Generally 4 cm.–14 cm. in width.

22. Necklaces—Necklaces are made of beads and/or small carved beads. May be made of shell, bone, stone, gold, silver, copper, or bronze. The beads are of varied shapes. All beads have two lateral perforations to hold the cord.

23. Tweezers—Made in one piece, with two identical ends and a flexed central handle. They typically are triangular, trapezoidal, and ovaloid in shape. The middle of the handle may have a hole so the tweezers can be suspended from a cord.

24. Feather Carriers—Conical objects with a pointed, hollow end, into which feathers, llama skin, or monkey tails are inserted and held in place with tar. They may be made of gold, silver, or gilded or silver-plated copper.

C. Pre-Columbian Ceramics

Examples of pre-Columbian ceramics include, but are not limited to, the following:

1. Chavín

a. *Date*: 1200–200 B.C.

b. *Characteristics*:

i. *Decoration*: A gray-black color.

Incised, modeled, and high and low-relief are combined to work out designs in grays and browns. The surface may also juxtapose polished and matte finish in different design zones.

ii. *Forms*: Bottles, plates, and bowls.

iii. *Size*: Generally 5 cm.–30 cm.

iv. *Identifying*: Characteristic traits of Cupisnique and Chavín ceramics are globular body with a flat base and stirrup spout; thick neck with an obvious and everted lip. Chavín style also includes long-necked bottles, bowls with flaring walls, and highly-polished relief-decorated surfaces.

v. *Styles*: Chavín influence is seen in Cupisnique, Chongoyape, Poemape, Tembladera, Patapo, and Chilete styles.

2. Vicús

a. *Date*: 900 B.C.–A.D. 500

b. *Characteristics*:

i. *Decoration*: Geometric designs in white on red, made using negative technique. There are also monochrome examples.

ii. *Forms*: Anthropomorphic, zoomorphic, and plant-shaped vessels. Some have a double body linked by a tube or common opening.

iii. *Size*: Generally 30 cm.–40 cm. tall.

3. Virú or Gallinazo

a. *Characteristics*:

i. *Decoration*: Negative technique over orange background.

ii. *Forms*: Faced anthropomorphic and zoomorphic vessels, face bottles for daily use in dwellings, and “cancheros” (type of pot without a neck and with a horn-shaped handle).

iii. *Size*: Up to 15 cm. tall.

iv. *Identifying*: The surface is basically orange; the vessels have a truncated spout, an arched bridge (like a tube) as handle, and geometric symbols in negative technique (concentric circles, frets and wavy lines). When the vessels represent a face, the eyes are like “coffee beans,” applied on the surface and with a transverse cut.

4. Pucara

a. *Date*: 300 B.C.–A.D. 300.

b. *Characteristics*:

i. *Decoration*: Slip-painted and incised. Modeled elements include stylized felines and camelids, along with an anthropomorphic image characteristically depicted with a staff in each hand. Vessels are typically decorated in yellow, black, and white on the red background of the vessel. Designs are characteristically outlined by incision. There may be modeled decoration, such as feline heads, attached to the vessels.

ii. *Shapes*: Tall bowls with annular ring bases predominate, along with vessels that depict anthropomorphic images.

iii. *Size*: Bowls are up to 20 cm. in diameter and 20 cm. in height.

5. Paracas

a. *Date*: Developed around 200 B.C.

b. *Characteristics*:

i. Vessels are typically incised, with post-fired resin painting on a black background.

ii. *Size*: 10 cm.–15 cm. tall.

6. Nazca

a. *Date*: A.D. 100–600.

b. *Characteristics*:

i. *Color*: Typically very colorful, with a range of slips including cream, black, red, violet, orange, gray, all in a range of tones.

ii. *Slip*: Background slip is generally cream or orange.

iii. *Shapes*: Cups, bowls, beakers, plates, double-spout-and-bridge bottles, anthropomorphic figures, and musical instruments.

iv. *Decoration*: Realistic drawings of fantastic creatures, including the “Flying God.” In late Nazca, bottles are broader and flatter and the designs are arrayed in broad bands. Typically have decorations of trophy heads, geometric motifs, and painted female faces.

v. *Size*: Generally 5 cm.–20 cm.

7. Recuay

a. *Date*: A.D. 100–700.

b. *Characteristics*:

i. *Slip*: Both positive and negative slip-painting is found, generally in colors of black, cream and red.

ii. *Shapes*: Sculptural, especially ceremonial jars known as “Paccha”, which have an elaborate outlet to serve a liquid.

iii. *Decoration*: Usually show groups of religious or mythical personages.

iv. *Size*: Generally 20 cm.–35 cm. in height.

8. Pashash

a. *Date*: A.D. 1–600.

b. *Characteristics*:

i. *Decoration*: Positive decoration in black, red, and orange on a creamy-white background. Some show negative painting.

ii. *Shapes*: Anthropomorphic vessels, bottles in the form of snakes, bowls with annular base, and large vessels with lids.

iii. *Size*: The anthropomorphic vessels are up to 20 cm. in height, serpent bottles are around 25 cm. wide x 10 cm. tall, and lidded vessels are more than 30 cm. in height.

iv. *Motifs*: The decorations are rendered in positive or negative painting in zones that depict profile-face images of zoomorphic figures, serpents, or worms, seen from above and with trapezoidal heads.

9. Cajamarca

a. *Date*: A.D. 500–900.

b. *Characteristics*:

i. *Decoration*: Pre-fired slip-painting with geometric designs such as stepped triangles, circles, lines, dots, and rows of volutes. They may include, but are not limited to, stylized birds, felines, camelids, batrachians, and serpents. Spiral figures may include a step-fret motif in the base of the bowls.

ii. *Shapes*: Pedestal base bowls, tripod bowls, bottles with annular ring base, goblets, spoons with modeled handles, and bowls with carinated edges.

10. Moche

a. *Date*: A.D. 200–700.

b. *Characteristics*:

i. *Forms*: Stirrup-spout vessels, vessels in the shape of humans, animals, or plants.

ii. *Colors*: Generally red and white.

iii. *Manufacture*: Often mold-made.

iv. *Size*: Generally 15 cm.–25 cm. in height.

v. *Decoration*: Wide range of images showing scenes of real life or mythical scenes depicting gods, warriors, and other images.

11. Tiahuanaco (Tiwanaku)

a. *Date*: A.D. 200–700.

b. *Characteristics*:

i. *Decoration*: Pre-fired slip-painting on a highly polished surface.

Background is generally a red-orange, with depictions of human, animal, and geometric images; generally outlined in black and white lines.

ii. *Shapes*: Plates, cups, jars, beakers, open-backed incense burners on a flat base.

12. Lima

a. *Date*: A.D. 200–700.

b. *Characteristics*:

i. *Decoration*: Pre-fired slip-painting with interlocking fish and snake designs, and geometric motifs such as zig-zags, lines, circles, and dots.

ii. *Shapes*: Breast-shaped bottles, cups, plates, bowls, and cook pots.

iii. *Styles*: Related to Playa Grande, Nievera, and Pachacamac styles.

13. Huari (Wari)

a. *Date*: A.D. 500–1000.

b. *Characteristics*:

i. *Colors*: Orange, cream, violet, white, black, and red.

ii. *Motifs*: Anthropomorphic, zoomorphic, and plant shapes, both stylized and realistic. In Pachacamac style one finds vessels with a globular body and long, conical neck. In Atarco style, there is slip-painting that retains Nazca motifs, especially in the full-body felines shown running.

iii. *Slip*: Background slip is commonly cream, red, or black.

iv. *Styles*: Related to Vinaque, Atarco, Pachacamac, Qosqopa, Robles Moqo, Conchopata, and Caquipampa styles.

v. *Size*: Most are around 25 cm. tall. Robles Moqo urns may be up to 1 m. in height.

14. Santa

a. *Date*: Derived from Huari (Wari) style, around A.D. 800.

b. *Characteristics*:

i. *Decoration*: Slip-painted with figures and designs in black and white on a red background. There are also face-neck jars.

ii. *Shapes*: Effigy vessels, face-neck jars, double-body vessels.

iii. *Sizes*: Generally 12 cm.–20 cm. tall.

iv. *Shapes*: Jars have a globular body and face on the neck. The border may have black and white checkerboard. The body sometimes takes the shape of a stylized llama head. Common are white lines dotted with black. Double-body vessels generally have an anthropomorphic image on the front vessel, and a plain back vessel.

15. Chancay

a. *Date*: A.D. 1000–1300.

b. *Characteristics*:

i. *Treatment*: Rubbed surface.

ii. *Slip*: White or cream with black or dark brown designs.

iii. *Molds*: Molds are commonly used, especially for the anthropomorphic figures called “cuchimilcos,” which represent naked male and female figures with short arms stretched to the sides.

iv. *Size*: 3 cm.–1 m.

16. Ica-Chincha

a. *Date*: Began to be developed in A.D. 1200.

b. *Characteristics*:

i. *Decoration*: Polychrome painting in black and white on red.

ii. *Designs*: Geometric motifs combined with fish and birds.

iii. *Shapes*: Bottles with globular bodies and tall necks and with flaring rims. Cups and pots.

iv. *Size*: Generally 5 cm.–30 cm. high.

17. Chimú

a. *Date*: A.D. 900–1500.

b. *Characteristics*:

i. *Slip*: Monochrome. Usually black or red.

ii. *Shapes*: Varied shapes. Commonly made in molds. They may represent fish, birds, animals, fruit, people, and architectural forms. One sees globular bodies with a stirrup spout and a small bird or monkey at the base of the neck.

iii. *Size*: Between 30 cm.–40 cm. in height.

18. Lambayeque

a. *Date*: A.D. 700–1100.

b. *Characteristics*:

i. *Color*: Generally black; a few are cream with red decoration.

ii. *Shapes*: Double spout and bridge vessels on a pedestal base are common. At the base of the spout one sees modeled heads and the bridge also often has modeled heads.

iii. *Size*: 15 cm.–25 cm. in height.

19. Inca

a. *Date*: A.D. 1300–1500.

b. *Characteristics*:

i. *Decoration*: Slip-painted in black, red, white, yellow, and orange.

ii. *Designs*: Geometric designs (rhomboids and triangles) and stylized bees, butterflies, and animals.

iii. *Sizes*: 1 cm. to 1.5 m. in height.

20. Chiribaya

a. *Date*: A.D. 1000–1476.

b. *Characteristics*:

i. *Shapes*: Bowls, cups, beakers, urns, jars, bottles, and pitchers.

ii. *Decoration*: Polychrome geometric pattern motifs in red, white, cream, black, orange, and brown. White dots are common.

21. Chuquibamba

a. *Date*: A.D. 1000–1476.

b. *Characteristics*:

i. *Shapes*: Pumpkin-shaped bowls, cups, canteens, and ceramic slabs.

ii. *Decoration*: Dark red slip decorated with black lines and polychrome paint. Linear designs include, but are not limited to camelids, birds, eight-pointed stars, cross-hatched and angular designs, sometimes delimited with rectangles. Slabs are decorated with geometric designs and anthropomorphic and zoomorphic figures.

22. Teatino

a. *Date*: A.D. 600–1000.

b. *Characteristics*:

i. *Shapes*: Open and closed vessels including mammiform jugs, canteens, spherical jars, and tripod vessels.

ii. *Decoration*: Reddish brown paste decorated with engraving, incising, and punctuation.

23. Pativilca

a. *Date*: A.D. 600–1000.

b. *Characteristics*:

i. *Shapes*: Jugs and bottles.

ii. *Decoration*: Orange monochrome mold-made pottery. Molds created stamped designs of monkeys, toads, birds, and anthropomorphic mythical creatures.

24. Huaura

a. *Date*: A.D. 600–1000

b. *Characteristics*:

i. *Shapes*: Cups, jars, and plates.

ii. *Decoration*: Red to orange paste decorated with polychrome geometric, anthropomorphic, and zoomorphic designs.

D. Pre-Columbian Lithics

Examples of pre-Columbian lithics include, but are not limited to, the following:

1. *Chipped Stone*: Projectile Points

a. Paiján Type Points

i. *Size*: Generally 8 cm.–18 cm.

ii. *Shape*: Triangular or heart-shaped.

iii. *Color*: Generally reddish, orange, or yellow. Can be made of quartz.

b. Leaf-Shaped Points

i. *Size*: Generally 2.5 cm.–15 cm.

ii. *Shape*: Leaf-shaped. Can be ovaloid or lanceolate.

iii. *Color*: Generally bright reds, yellows, ochers, quartz crystals, milky whites, greens, and blacks.

c. Paracas Type Points

i. *Size*: 0.3 cm.–25 cm.

ii. *Shape*: Triangular and lanceolate. Show marks of pressure-flaking. Often they are broken.

iii. *Color*: Generally black.

d. Chivateros Type Blanks

i. *Size*: Generally 0.8 cm.–18 cm.

ii. *Shape*: Concave indentations on the surface from working.

iii. *Color*: Greens, reds, and yellows.

2. *Polished Stone*

a. Bowls—Vessels of dark colored-stone, sometimes streaked. They have a highly polished, very smooth surface. Some show external carved decoration. Diameters range from 12 cm–55 cm.

b. Cups—Vessels of dark-colored stone. Generally, have flaring sides. Typical of the Late Horizon. They are highly polished and may have external carved designs or may be in the shape of heads. 18 cm.–28 cm. in height.

c. Conopas—Small vessels in the form of camelids with a hollow opening on the back. They are black to greenish-black and highly polished. 0.8 cm.–16 cm. in length.

d. Idols—Small anthropomorphic figurines, frequently found in Middle Horizon contexts. The almond-shaped eyes with tear-bands are characteristic of the style. Larger examples tend to be of lighter-colored stone while the

smaller ones are of dark stones. 12 cm.–28 cm. in height.

e. Mace Heads—Varying shapes, most commonly are doughnut-shaped or star-shaped heads, generally associated with Late Intermediate Period and Inca cultures. Commonly black, gray, or white, 0.8 cm.–20 cm. in diameter.

f. Metalworking Hammers—Elongated shapes, frequently with one flat surface; highly polished. Generally, of dark-colored stone, 3 cm.–12 cm.

3. Carved Material

a. Tenon Heads—These heads have an anthropomorphic face, prominent lips, and enormous noses. Some, especially those carved of diorite, have snake-like traits. The carved surface is highly polished.

b. Tablets—With high-relief design. The upper surface has a patina. They range from 20 cm. to more than 1 m. in length.

E. Pre-Columbian Perishable Remains

Examples of pre-Columbian perishable remains include, but are not limited to, the following:

1. Wood

a. Keros (Beakers)—The most common form is a bell-shaped beaker with a flat base, though some have a pedestal like a goblet. Decoration varies with the period:

i. *Pre-Inca*: Very rare, they have straight sides and incised or high-relief decoration. Some have inset shells.

ii. *Inca*: Generally, they are incised with geometric designs on the entire exterior.

iii. *Colonial Inca*: Lacquer painted on the exterior to depict scenes of daily life, nature, and war.

b. Staffs—Objects of ritual or ceremonial use made of a single piece of wood. They can be distinguished on the basis of two or three of the following traits:

i. On the lower third, the staff may have a metal decoration.

ii. The body itself is cylindrical and of variable length.

iii. The upper third may have decorations such as inset shell, stone, or metal. Some staffs function as rattles and, in these cases, the rattle is in the upper part.

c. Carvings—Worked blocks of wood, such as wooden columns (orcones) to support the roofs of houses: Prevalent in Chincha, Chimú, and Chancay cultures. Individuals may be depicted standing or seated on a pedestal. In the upper part there is a notch to support the beams, which generally has a face, sometimes painted, at the base of the notch. Their length varies, but they are generally at least a meter or more.

d. Boxes—Small lidded boxes, carved of two pieces of wood. Generally the

outer surface of the box and lid are carved in relief. Prevalent in Chimú-Inca cultures. They measure approximately 20 cm. x 10 cm.

e. Mirrors—Wooden supports for a reflective surface of polished anthracite or pyrite. In some cases the upper part of backs of mirrors are worked in relief or have insets of shell. Prevalent in Moche culture.

f. Paddles and Rudders—Large carvings made of a single piece of wood. Paddles have three parts: the blade, the handle (sometimes decorated), and an upper decorated part, which can have metal plaques or decorative painting. Rudders have two parts: the blade and the handle, which may be carved in relief. Prevalent in Chincha culture. Paddles can be 2.30 m. in length and rudders are up to 1.4 m.

g. Utensils—Bowls and spoons made of wood decorated with zoomorphic or anthropomorphic motifs.

h. Musical Instruments—Trumpets and whistles. Trumpets can be up to 1.2 m. long and are generally decorated on the upper third of the instrument. Whistles vary a great deal, from the undecorated to those decorated with human forms. Prevalent in Moche, Huari (Wari), and Inca cultures.

2. Bone

a. Worked Bone—Tools, ornaments, and other items made from bone. Examples include, but are not limited to weaving tools, spoons, ornaments, and Chavín pieces with incised decorations. The bones are generally the long bones of mammals. They vary from 10 cm.–25 cm. in length.

b. Balance Weights—Flat rectangles of bone about 10 cm. in length. Prevalent in Chincha culture.

c. Musical Instruments—Quenas (flutes) and antaras (panpipes) in various shapes. Prevalent in Paracas, Chincha, and Ancon cultures.

3. Gourds

a. Vessels—Bowls, pots, and holders for lime (for coca chewing). May have carved or pyro-engraved decoration. Produced from the Preceramic onward.

b. Musical Instruments—Ocarinas, small flutes, and whistles. Inca examples may have incised decoration or decoration with cords and feathers.

4. Canes

a. Musical Instruments—Flutes (especially in Chancay culture), panpipes, and whistles. Flutes are often pyro-engraved. Panpipes can have one or two tiers of pipes, which may be lashed together with colored thread. Prevalent in Nazca culture.

5. Straw Weaving Baskets—Basketry over a cane armature, in the shape of a lidded box. Sometimes the basketry is made of several colors of fiber to work

out geometric designs. Some still hold their original contents: needles, spindle whorls, spindles, balls of thread, loose thread, etc. Prevalent in Chancay culture.

6. Shell

a. Musical Instruments—Instruments made from marine shells such as *Strombus galeatus*, *Malea ringens*, etc. Some, especially those from the Formative Period, with incised decoration.

b. Jewelry—Small beads and charms worked of shell, chiefly *Spondylus princeps*, used mainly in necklaces and pectorals. Prevalent in Moche, Chimú, and Inca cultures.

7. False Shrunken Heads—False shrunken heads can be recognized because they are made of the skin of a mammal, with some of the fur left where the human hair would be. The skin is first smoked, then pressed into a mold to give it a face-like shape. The eyes, nose, mouth and ears are simple bumps without real holes. Further, the skin is very thin and yellowish in color. Often the “heads” have eyebrows and mustaches formed by leaving some of the animal hair, but these features are grotesque because they appear to grow upside down.

F. Pre-Columbian Human Remains

Examples of pre-Columbian human remains include, but are not limited to, the following:

1. Mummies—Peruvian mummies were formed by natural mummification due to the conditions of burial; they have generally not been eviscerated. Usually found in a flexed position, with extremities tied together, resulting in a fetal position. In many cases, the cords used to tie the body in this position are preserved.

2. Modified Skulls—Many ancient Peruvian cultures practiced cranial modification. Such skulls are easily recognized by their unnatural shapes.

3. Skulls Displaying Trepanation—Trepanation is an operation performed on a skull; the resulting cuts, easily visible on a bare skull, take various forms. Cuts may be less easily distinguished if skin and hair are present:

a. Principal Techniques.

i. *Straight cuts*: these cuts are pointed at the ends and wider in the center. Openings made this way have a polygonal shape.

ii. *Cylindrical-conical openings*: the openings form a discontinuous line. The resulting opening has a serrated edge.

iii. *Circular*: generally made by a file. The resulting hole is round or elliptical, with beveled or straight edges. This is the most common form of trepanation.

4. Pre-Columbian Trophy Heads—Trophy heads can be identified by the hole made in the forehead to accommodate a carrying cord. When the skin is intact, the eyes and the mouth are held shut with cactus thorns. Finally, the occiput is missing since that is how the brain was removed when the trophy head was prepared.

5. Shrunken Trophy Heads from the Amazon—These heads have had the bones removed and then have been cured to shrink them. They are recognizable because they conserve all the traits of the original skin, including hair and hair follicles. The mouth is sewn shut and generally there are carrying cords attached. There may be an obvious seam to repair the cuts made when the skin was removed from the skull. Finally, the skin is thick (up to 2.5 mm.) and has a dark color. Trophy heads vary between 9.5 cm. and 15.5 cm. in height.

6. Tattoos—Tattooing in pre-Columbian Peru was practiced mainly on the wrists. Most common are geometric designs, including bands of triangles and rhomboids of a bluish color.

II. Ethnological Material

A. Objects Directly Related to the Pre-Columbian Past

1. Colonial Indigenous Textiles

a. *Predominant materials:* Cotton and wool.

b. *Description:* These textiles are characterized by the cut of the cloth, with the four borders or selvages finished on the same loom. Clothes are untailored and made from smaller pieces of convenient sizes that were then sewn together. Colonial indigenous textiles of the period are differentiated from pre-Columbian textiles primarily by their decoration: western motifs such as lions, heraldic emblems, and Spanish personages are incorporated into the designs; sometimes fibers distinct from cotton or wool (threads of silver, gold, and silk) are woven into the cloth; and the colors tend to be more vivid because the fabrics were made more recently. Another important characteristic of the clothing is the presence of tocapus or horizontal bands of small squares with anthropomorphic, zoomorphic, phytomorphic, and geometric ideographs and designs. Characteristic textiles include, but are not limited to, the following:

i. Panels—Rectangular or square pieces of various sizes.

ii. Anacus—Untailored woman's dress consisting of two or three long horizontal pieces of cloth sewn together

that was wound around the body and held in place with "tupus" (pins).

iii. Unkus/Tunics—Men's shirt with an opening for the head. Sometimes has sleeves.

iv. Llicllas/Shoulder Mantles—Rectangular piece of cloth that women put over their shoulders and held in place by a tupu; standard size: 1 m. x 1.15 m. Generally has a tripartite design based on contrasting panels that alternate bands with decoration and bands with solid colors.

v. Chumpis/Belts—A woven belt, generally using tapestry technique.

2. Tupus

a. *Material:* Silver, gilded silver, copper, bronze. May have inlays of precious or semi-precious stones.

b. *Description:* Tupus were used to hold in place llicllas and anacus. They are pins with a round or elliptical head, with piercing, repoussé, and incised decorations. The difference between pre-Columbian and ethnological tupus can be seen in the introduction of Western designs, for example bi-frontal eagles and heraldic motifs.

3. Keros

a. *Material:* Wood.

b. *Description:* The most common form is a beaker-like cup with truncated base. After the Conquest, keros started to be decorated with pictorial scenes. The most frequently used techniques include incision, inlaying pigments in wood, and painting. Motifs include, but are not limited to, geometric designs, figures under a rainbow (an Inca symbol), ceremonial rituals, scenes of war, and agricultural scenes. Sometimes are in the form of human or zoomorphic heads.

4. Cochas or Cocchas

a. *Material:* Ceramic.

b. *Description:* Ceremonial vessels with two or more concentric interior compartments that are linked. Often decorated with volutes representing reptiles.

5. Aribalos

a. *Material:* Ceramic.

b. *Description:* The post-Conquest aribalos have a flat base, often using a glaze for finishing, and the decoration includes Inca and Hispanic motifs.

6. Pacchas

a. *Material:* Stone, ceramic.

b. *Description:* One of the characteristics of pacchas is that they have a drain, which is used to sprinkle an offering on the ground. They have pictorial or sculpted relief decorations symbolizing the benefits hoped for from the ritual.

B. Ecclesiastical Objects

In Colonial paintings and sculptures, European religious themes were

reinterpreted by indigenous and mestizo artists who added their own images and other characteristics to create a distinct iconography.

Examples of ecclesiastical objects include, but are not limited to, the following:

1. Sculpture

Types of sculptures include, but are not limited to, the following:

a. Three-Dimensional Sculpted Images—In the Peruvian Colonial period, these were made of maguey (a soft wood) and occasionally of cedar or walnut.

b. Images Made of a Dough Composed of Sawdust, Glue, and Plaster—After they were sculpted, figures were dressed with cloth dipped in plaster.

c. Images to be Dressed—These are wooden frames resembling mannequins, with only the head and arms sculpted in wood (cedar or maguey). The images were dressed with embroidered clothes and jewelry. Frequently other elements were added, such as teeth and false eyelashes, wigs of real hair, eyes of colored glass, and palates made of glass.

2. Paintings—Catholic priests

provided indigenous and mestizo artists with canvases and reproductions of European works of art, which the artists then "interpreted" with their own images and other indigenous characteristics. These may include symbolically associating Christian religious figures with indigenous divinities or rendering the figures with Andean facial characteristics or in traditional Andean costume. In addition, each church, convent, monastery, and town venerated an effigy of its patron or tutelar saint, some of them native to Peru.

3. Furniture

a. Altarpieces or Retablos—

Architectonic structures made of stone, wood, or other material that are placed behind the altar and include attached paintings, sculptures, or other religious objects.

b. Reliquaries and Coffins—

Containers made from wood, glass, or metal hold and exhibit sacred objects or human remains.

c. Church Furnishings—Furnishings used for liturgical rites include, but are not limited to pulpits, tabernacles, lecterns, confessionals, pews, choir stalls, chancels, baldachins, and palanquins.

4. Liturgical Objects

a. Objects Used for the Mass—

Chalices, cibaries, candelabras, vials for christening or consecrated oil, reliquaries, vessels for wine and water (cruets), incense burners (censers), patens, monstrances, pelican sculptures, and crucifixes. Made out of silver, gold

or gilded silver, often inlaid with pearls or precious stones. Techniques: casting, engraving, piercing, repoussé, filigree.

b. **Fixtures for Sculpted Images**—Areoles, crowns, scepters, halos, halos in the form of rays, and books carried by religious scholars and founders of religious orders.

c. **Ecclesiastical Vestments**—Some ecclesiastical vestments were commissioned by indigenous individuals or communities for the celebrations of their patron saint and thus are part of the religious legacy of a particular town. In such cases, the vestment may have the name of the donor, town, and/or church as well as the date.

d. **Votive Offerings**—These are representations of miracles or favors received from a particular saint. They can be made of different materials, usually metal or wood, and come in a variety of forms according to the type of favor received, usually representing parts of the human body in reference to the organ healed or agricultural products in recognition of a good harvest or increase in a herd.

C. Colonial Manuscripts, Documents, and Prints

1. **Manuscripts and Documents**—Original handwritten texts of limited circulation dating to the Colonial period (A.D. 1532–1821) made primarily on paper, parchment, and vellum. These include, but are not limited to, notary documents (*e.g.*, wills, bill of sales, contracts), ecclesiastical materials, and documents of the city councils, Governorate of New Castile, the Governorate of New Toledo, the Vice Royalty of Peru, the Real Audiencia and Chancery of Lima, or the Council of the Indies. These can include single folios, collections of related documents bound with string, and music scores. Documents may contain a seal or ink stamp denoting a public or ecclesiastical institution. Because many of these documents are of an institutional or official nature, they may have multiple signatures, denoting scribes, witnesses, and/or other authorities. Documents are

generally written in Spanish but may be composed in an indigenous language such as Quechua or Aymara.

2. **Printed Texts and Images**—Printed books, pamphlets, maps, and sheets of limited circulation made in small workshops during the Colonial period (A.D. 1532–1821). Prints were primarily produced using xylography (woodcuts) and chalcography (metal plates) on paper. Topics include, but are not limited to, government laws and ordinances, religious texts (sermons, manuals, prayer books, devotional sheets, etc.), grammar, and dictionaries. Common images include, but are not limited to, religious imagery, allegorical imagery, portraits, coats of arms, celebrations, funerals, tombs, architecture, and ornamental elements such as flowers, columns, volutes, and urns. Texts are generally written in Spanish but may be composed in an indigenous language such as Quechua or Aymara.

3. **Printing Stamps and Plates**—Stamps and plates include fonts, text, and images produced primarily using xylography (woodcuts) and chalcography (metal plates).

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12866

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, and Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Peru to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
* * *	* * *	* * *
Peru	Archaeological material of Peru ranging from approximately 12000 B.C. to A.D. 1532, and ethnological material of Peru ranging from approximately A.D. 1532 to 1821.	CBP Dec. 23–10
* * *	* * *	* * *

* * * * *

Robert F. Altneu,
*Director, Regulations & Disclosure Law
Division, Regulations & Rulings, Office of
Trade, U.S. Customs and Border Protection.*

Approved:
Thomas C. West, Jr.,
*Deputy Assistant Secretary of the Treasury
for Tax Policy.*
[FR Doc. 2023–19768 Filed 9–12–23; 8:45 am]
BILLING CODE 9111–14–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation’s regulation on Allocation of Assets in Single-Employer Plans to prescribe interest assumptions under the asset allocation regulation for plans with valuation dates in the fourth quarter of 2023. These interest assumptions are used for valuing benefits under terminating single-employer plans and for other purposes.

DATES: Effective October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Gregory Katz (*katz.gregory@pbgc.gov*), Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, 202–229–3829. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: PBGC’s regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) prescribes actuarial assumptions—including interest assumptions—for valuing benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The interest assumptions in the regulation are also published on PBGC’s website (*https://www.pbgc.gov*). PBGC uses the interest assumptions in appendix B to part 4044 (“Interest Rates Used to Value Benefits”) to determine the present value of annuities in an involuntary or distress termination of a single-employer plan under the asset allocation regulation. The assumptions are also used to determine the value of multiemployer plan benefits and certain assets when a plan terminates by mass withdrawal in accordance with PBGC’s regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281).

The fourth quarter 2023 interest assumptions will be 5.06 percent for the first 20 years following the valuation date and 4.37 percent thereafter. In comparison with the interest assumptions in effect for the third quarter of 2023, these interest assumptions represent no change in the select period (the period during which the select rate (the initial rate) applies), a decrease of 0.18 percent in the select rate, and a decrease of 0.21 percent in the ultimate rate (the final rate).

Need for Immediate Guidance

PBGC has determined that notice of, and public comment on, this rule are impracticable, unnecessary, and contrary to the public interest. PBGC routinely updates the interest assumptions in appendix B of the asset

allocation regulation each quarter so that they are available to value benefits. Accordingly, PBGC finds that the public interest is best served by issuing this rule expeditiously, without an opportunity for notice and comment, and that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication to allow the use of the proper assumptions to estimate the value of plan benefits for plans with valuation dates early in the fourth quarter of 2023.

PBGC has determined that this action is not a “significant regulatory action” under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4044

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, 29 CFR part 4044 is amended as follows:

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 2. In appendix B to part 4044, an entry for “October–December 2023” is added at the end of the table to read as follows:

Appendix B to Part 4044—Interest Rates Used to Value Benefits

* * * * *

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for $t =$	i_t	for $t =$	i_t	for $t =$
* * * * *						
October–December 2023	0.0506	1–20	0.0437	>20	N/A	N/A

Issued in Washington, DC.

Hilary Duke,
*Assistant General Counsel for Regulatory
Affairs, Pension Benefit Guaranty
Corporation.*
[FR Doc. 2023–19803 Filed 9–12–23; 8:45 am]
BILLING CODE 7709–02–P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 165**

[USCG–2023–0698]

RIN 1625–AA00

Safety Zone; Missouri River MM 184.5–185.5, Rocheport, MO**AGENCY:** Coast Guard, DHS.**ACTION:** Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters in the Missouri River at Mile Marker (MM) 184.5 through 185.5. The safety zone is needed to protect personnel, vessels, and the marine environment from all potential hazards associated with the demolition of the I–70 Bridge. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative.

DATES: This rule is effective without actual notice from September 13, 2023 through September 24, 2023. For the purposes of enforcement, actual notice will be used from September 10, 2023 until September 13, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–0698 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Nathaniel Dibley, Sector Upper Mississippi River Waterways Management Division, U.S. Coast Guard; telephone 314–269–2560, email Nathaniel.D.Dibley@uscg.mil.

SUPPLEMENTARY INFORMATION:**I. Table of Abbreviations**

CFR Code of Federal Regulations
 DHS Department of Homeland Security
 FR Federal Register
 NPRM Notice of proposed rulemaking
 § Section
 U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision

authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because a temporary safety zone must be established immediately to protect personnel, vessels, and the marine environment from potential hazards created by the demolition of the I–70 bridge situated over the Missouri River and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule. It is impracticable to publish an NPRM because we must establish this safety zone September 10, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the demolition of the I–70 bridge.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Upper Mississippi River (COTP) has determined that potential hazards associated with the demolition of the I–70 bridge will be a safety concern for anyone operating or transiting within the Missouri River from MM 184.5 through 185.5. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the demolition is being conducted.

IV. Discussion of the Rule

The I–70 Bridge, located between MM 184.5 and 185.5, will be demolished. The planned date of demolition is September 10, 2023, with an operational window until September 24, 2023, in the event of inclement weather. The safety zone is designed to protect waterway users until work is complete.

No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River. To seek permission to enter, contact the COTP or a designated representative via

VHF–FM channel 16, or through USCG Sector Upper Mississippi River at 314–269–2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative. The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in the size of the safety zone through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB), as appropriate.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on a safety zone located on the Missouri River at MM 184.5–185.5, near Rocheport, MO. The Safety Zone is expected to be active only during the demolition event, or until September 24, 2023.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the

reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator because the zone will be enforced only when work is being conducted.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone encompassing the width of the Missouri River at MM 184.5–185.5. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security Measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0698 to read as follows:

§ 165.T08–0698 Safety Zone; Missouri River, Mile Markers 184.5–185.5, Rocheport, MO.

(a) *Location.* The following area is a safety zone: all navigable waters within Missouri River, Mile Markers 184.5–185.5, Rocheport, MO.

(b) *Definitions.* As used in this section, *designated representative* means a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River.

(c) Regulations.

(1) In accordance with the general safety zone regulations in § 165.23, entry of persons or vessels into this safety zone described in paragraph (a) of this section is prohibited unless authorized by the COTP or a designated representative.

(2) To seek permission to enter, contact the COTP or a designated representative via VHF–FM channel 16, or through USCG Sector Upper Mississippi River at 314–269–2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative.

(d) *Enforcement period and informational broadcasts.* This section is subject to enforcement from September 10, 2023, through September 24, 2023. The COTP or a designated representative will inform the public of the effective period for the safety zone and all dates and times of enforcement, as well as reductions in size or scope of the safety zone through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB) as appropriate. The COTP or a designated representative will inform the public through those same means of the termination of enforcement if enforcement of the zone is no longer required prior to the rule's termination.

Dated: September 7, 2023.

A.R. Bender,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2023–19735 Filed 9–12–23; 8:45 am]

BILLING CODE 9110–04–P

Proposed Rules

Federal Register

Vol. 88, No. 176

Wednesday, September 13, 2023

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-1823; Project Identifier MCAI-2023-00314-T]

RIN 2120-AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain MHI RJ Model CL-600-2C10 (Regional Jet Series 700, 701 & 702), CL-600-2C11 (Regional Jet Series 550), CL-600-2D15 (Regional Jet Series 705), CL-600-2D24 (Regional Jet Series 900), and CL-600-2E25 (Regional Jet Series 1000) airplanes. This proposed AD was prompted by a report of a passenger seat Y-belt (lap belt) re-installed in the wrong orientation, due to an incorrect maintenance manual. This proposed AD would require inspecting certain Y-belts for correct installation and damage and corrective actions if necessary. This proposed AD would also prohibit the use of certain revisions of a maintenance task. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by October 30, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.
- *Fax:* (202) 493-2251.
- *Mail:* U.S. Department of

Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1823; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For MHI RJ service information identified in this NPRM, contact MHI RJ Aviation Group, Customer Response Center, 3655 Ave. des Grandes-Tourelles, Suite 110, Boisbriand, Québec J7H 0E2 Canada; North America toll-free telephone 833-990-7272 or direct-dial telephone 450-990-7272; fax 514-855-8501; email thd.crj@mhirj.com; website [mhirj.com](https://www.mhirj.com).

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

FOR FURTHER INFORMATION CONTACT: Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228-7300; email: 9-avs-nyaco-cos@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA-2023-1823; Project Identifier MCAI-2023-00314-T" at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments

received, without change, to [regulations.gov](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7350; email: Fatin.R.Saumik@faa.gov. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF-2023-10, dated February 17, 2023 (Transport Canada AD CF-2023-10) (also referred to after this as the MCAI), to correct an unsafe condition on certain MHI RJ Aviation ULC (formerly Bombardier, Inc.) Model CL-600-2C10, CL-600-2C11, CL-600-2D15, CL-600-2D24, and CL-600-2E25 airplanes. The MCAI states that following maintenance on a Model CL-600-2C10 airplane, a Y-belt (also known as lap belt) was re-installed in the wrong orientation. The MCAI further states that the instructions contained within the aircraft maintenance manual (AMM) on how to install the passenger seat Y-belts, showed an incorrect orientation of the Y-belt assembly. The MCAI confirms the manufacturer updated the AMM tasks and these instructions have been

corrected. Y-belts installed in the wrong orientation, if not corrected, could result in passenger injury due to head impact on the front monument during an emergency landing.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1823.

Related Service Information Under 1 CFR Part 51

The FAA reviewed MHI RJ Service Bulletin 670BA–25–135, Revision B, dated November 25, 2022. This service information specifies procedures to inspect for correct installation (as shown in certain maintenance tasks) of each passenger seat Y-belt. This service information also specifies corrective

actions, which include re-installing each incorrectly installed Y-belt per certain maintenance tasks and addressing damage (includes dents or misshapen hooks that attach the belt to the seat).

This is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in

ADDRESSES.

FAA’s Determination

These products has/have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information described above. The FAA

is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require inspecting certain Y-belts for correct installation and damage and corrective actions if necessary. This proposed AD would also prohibit the use of certain revisions of a maintenance task.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 606 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × \$85 per hour = \$170	\$0	\$170	\$103,020

The FAA estimates the following costs to do any necessary replacements that would be required based on the

results of the proposed inspection. The agency has no way of determining the

number of aircraft that might need these replacements.

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 0.5 work-hours × \$85 per hour = \$43	Up to \$550 per Y-belt assembly	Up to \$593.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency’s authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and
- (3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.); Docket No. FAA–2023–1823; Project Identifier MCAI–2023–00314–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 30, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC (Type Certificate previously held by Bombardier, Inc.) airplanes, certificated in any category, identified in paragraphs (c)(1) through (3) of this AD.

(1) Model CL-600-2C10 (Regional Jet Series 700, 701 & 702) and CL-600-2C11 (Regional Jet Series 550) airplanes, serial numbers (S/N) 10001 through 10348 inclusive.

(2) Model CL-600-2D15 (Regional Jet Series 705) and CL-600-2D24 (Regional Jet Series 900) airplanes, S/N 15001 through 15499 inclusive.

(3) Model CL-600-2E25 (Regional Jet Series 1000) airplanes, S/N 19001 through 19064 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code: 25, Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by a report of a passenger seat Y-belt (lap-belt) re-installed in the wrong orientation, due to an incorrect maintenance manual. The FAA is issuing this AD to detect and address Y-belts that are incorrectly installed. The unsafe condition, if not addressed, could result in passenger injury due to head impact, on the front monument during an emergency landing.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Requirements

Except as specified in paragraph (h) of this AD: Within 24 months after the effective date of this AD, inspect each Y-belt for correct installation and damage and, if any incorrect installation or damage is found, within 24 months after the effective date of this AD, do all applicable corrective actions, in accordance with paragraph B, "Procedure," of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA-25-135, Revision B, dated November 25, 2022. For this AD, damage includes dents or misshapen hooks that attach the belt to the seat.

Note 1 to paragraph (g): Y-belts are also known as lap belts.

(h) Exceptions to Service Information

Where paragraph B, "Procedure," of the Accomplishment Instructions of MHI RJ Service Bulletin 670BA-25-135, Revision B, dated November 25, 2022, specifies to "refer to AMM" replace those words with "in accordance with AMM."

(i) Maintenance Task Prohibition

As of the effective date of this AD, it is prohibited to use MHI RJ Aviation ULC Aircraft Maintenance Manual (AMM) task 25-21-04-400-801, revision 69 or earlier.

(j) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those

actions were performed before the effective date of this AD using the service information identified in paragraph (j)(1) or (2) of this AD, provided the actions were done using MHI RJ AMM Revision 70, dated May 25, 2022, or Revision 71, dated December 16, 2022.

(1) MHI RJ Service Bulletin 670BA-25-135, dated June 1, 2022.

(2) MHI RJ Service Bulletin 670BA-25-135, Revision A, dated August 30, 2022.

(k) Additional AD Provisions

The following provisions also apply to this AD.

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Manager of the International Validation Branch, mail it to ATTN: Program Manager, Continuing Operational Safety, at the address identified in paragraph (l)(2) of this AD or email to: 9-AVS-AIR-730-AMOC@faa.gov. If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada or MHI RJ Aviation ULC's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(l) Additional Information

(1) Refer to Transport Canada AD CF-2023-10, dated February 17, 2023, for related information. This Transport Canada AD may be found in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1823.

(2) For more information about this AD, contact Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228-7300; email: 9-avs-nyaco-cos@faa.gov.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (4) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) MHI RJ Service Bulletin 670BA-25-135, Revision B, dated November 25, 2022.

(ii) [Reserved]

(3) For MHI RJ Aviation ULC service information identified in this AD, contact MHI RJ Aviation Group, Customer Response Center, 3655 Ave. des Grandes-Tourelles,

Suite 110, Boisbriand, Québec J7H 0E2 Canada; North America toll-free telephone 833-990-7272 or direct-dial telephone 450-990-7272; fax 514-855-8501; email thd.crj@mhirj.com; website [mhirj.com](https://www.mhirj.com).

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on September 7, 2023.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-19673 Filed 9-12-23; 8:45 am]

BILLING CODE 4910-13-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2022-0441; FRL-8673-02-OAR]

RIN 2060-AV47

Regulatory Requirements for New HAP Additions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing to amend the General Provisions for National Emission Standards for Hazardous Air Pollutants (NESHAP) to address applicability and compliance issues resulting from the addition of a compound to the list of hazardous air pollutants (HAP) under the Clean Air Act (CAA). This action focuses on issues related to newly applicable standards for sources that become major sources solely from the addition of a compound to the CAA HAP list. This action also includes a discussion of the impacts of a newly listed HAP on the federal operating permit program.

DATES:

Comments: Comments must be received on or before November 13, 2023.

Public hearing: If anyone contacts us requesting a public hearing on or before September 18, 2023, we will hold a virtual public hearing. See

SUPPLEMENTARY INFORMATION for

information on requesting and registering for a public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OAR-2022-0441, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- **Email:** a-and-r-docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2022-0441 in the subject line of the message.
- **Fax:** (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2022-0441.
- **Mail:** U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2022-0441, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- **Hand Delivery/Courier:** EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact U.S. EPA, Attn: Susan Miller, Mail Drop: D205-02, 109 T.W. Alexander Drive, P.O. Box 12055, RTP, North Carolina 27711; telephone number: (919) 541-2443; email address: miller.susan@epa.gov. For additional information, see <https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-additions>.

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. To request a virtual public hearing, contact the public hearing team at (888) 372-8699 or by email at SPPDpublichearing@epa.gov. If requested, the virtual hearing will be held on October 4, 2023. The hearing will convene at 11:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at <https://www.epa.gov/>

stationary-sources-air-pollution/infrastructure-new-hap-additions.

If a public hearing is requested, the EPA will begin pre-registering speakers for the hearing no later than 1 business day after a request has been received. To register to speak at the virtual hearing, please use the online registration form available at <https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-additions> or contact the public hearing team at (888) 372-8699 or by email at SPPDpublichearing@epa.gov. The last day to pre-register to speak at the hearing will be September 25, 2023. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers at: <https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-additions>.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 4 minutes to provide oral testimony. The EPA encourages commenters to submit the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-additions>. While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372-8699 or by email at SPPDpublichearing@epa.gov to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by September 20, 2023. The EPA may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2022-0441. All documents in the docket are listed in <https://www.regulations.gov/>. Although

listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, WJC West Building, 1301 Constitution Avenue NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

Instructions. Direct your comments to Docket ID No. EPA-HQ-OAR-2022-0441. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov/>, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to https://www.regulations.gov any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/submitting-comments>.

The <https://www.regulations.gov/> website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through <https://www.regulations.gov/>, your email address will be automatically captured and included as part of the comment

that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <https://www.epa.gov/dockets>.

Submitting CBI. Do not submit information containing CBI to the EPA through <https://www.regulations.gov/>. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in the *Instructions* section of this document. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (e.g., Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, please send it to the following

address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2018-0747. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Preamble acronyms and abbreviations. Throughout this document the use of "we," "us," or "our" is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

1-BP 1-bromopropane
ANPRM advanced notice of proposed rulemaking
CAA Clean Air Act
CBI Confidential Business Information
CFR Code of Federal Regulations
EPA Environmental Protection Agency
HAP hazardous air pollutant(s)
MACT maximum achievable control technology
MSDL Major Source Due to Listing
NESHAP national emission standards for hazardous air pollutants
OMB Office of Management and Budget
PRA Paperwork Reduction Act
PTE potential to emit
UMRA Unfunded Mandates Reform Act

Organization of this document. The information in this preamble is organized as follows below.

I. General Information

- A. What action is the Agency taking?
- B. Does this action apply to me?
- C. What is the statutory authority for this action?
- D. Where can I get a copy of this document and other related information?

II. Basis for the Proposed Action

- A. What changes are we proposing?
- B. Are there any concurrent changes to Title V Programs in this action?
- C. What is our rationale for the proposed changes?
 1. Are newly listed HAP regulated under NESHAP promulgated before the effective date of the listing?
 2. When must a newly listed HAP be included in emission estimates and what are the potential regulatory implications?
 3. What standards apply to MSDL facilities?
 4. When does an MSDL facility have to be in compliance with new requirements?
 5. Are there any new notification requirements?

III. Solicitation of Additional Comments

- A. Regulatory Changes
- B. Early Input on Future EPA Action to Integrate Newly Listed HAP Into the CAA Section 112 Program

IV. Statutory and Executive Order Reviews

- A. Executive Order 12866: Regulatory Planning and Review and Executive

Order 13563: Improving Regulations and Regulatory Review

- B. Paperwork Reduction Act (PRA)
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act (UMRA)
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

I. General Information

A. What action is the Agency taking?

Section 112(b) of the CAA established a list of 189 hazardous air pollutants (HAP). This provision of the CAA also provides the EPA with the authority to modify the list. In response to a petition to the Administrator to list 1-bromopropane or 1-BP (also known as n-propyl bromide (nPB)), the EPA, for the first time, added a new HAP to the CAA section 112(b) HAP list (HAP list) on January 5, 2022. Based on this new addition to the HAP list, the EPA determined that there are several regulatory implications and issues that must be addressed to fully integrate a newly listed HAP into the existing CAA section 112 program. This rule, when finalized, will address the immediate regulatory effects of adding a pollutant to the HAP list. This proposal addresses three specific issues that we identified. The first issue is whether already promulgated National Emission Standards for Hazardous Air Pollutants (NESHAP) would apply to a newly listed HAP. For example, for a NESHAP with a limit for total HAP, owners or operators of sources that emit the newly listed HAP and are subject to the limit need to understand whether they must include the emissions of the newly listed HAP to determine whether the source meets that limit. The second issue is the consideration of the permitting implications for facilities that become major sources under CAA section 112 solely due to the addition of a new pollutant to the HAP list (hereinafter Major Source Due to Listing or "MSDL" facilities). The third issue for a MSDL facility that triggers the applicability of a major source NESHAP is the determination of the applicable

emission standards (in particular, whether the source is subject to the standards for new sources or existing sources) and the compliance deadlines for those newly applicable NESHAP requirements.

The EPA is not proposing any changes to the part 70 regulations to address the addition of a new pollutant to the CAA section 112 HAP list as the current program appropriately covers these issues. However, after reviewing the existing NESHAP regulations, the EPA intends to clarify the applicability of previously promulgated NESHAP when the EPA adds a new pollutant to the HAP list by revising 40 CFR 63.64, subpart C. In addition, the EPA is proposing initial notifications, several alternatives to address applicable emission standards and compliance deadlines for MSDL facilities by revising 40 CFR, subpart A.

This proposed rulemaking addresses the immediate compliance obligations for the regulated community following the addition of a new HAP. This is only one part of the overall program to incorporate a new HAP into the CAA section 112 regulatory framework. Future actions within individual NESHAP will address rule-specific issues, including identification of the sources that emit the new HAP; promulgation of standards, as warranted, that include the new HAP by either revising existing NESHAP standards or establishing new standards, as necessary; and identification of engagement and outreach needs with affected communities and other entities.

The actions we are taking regarding section II. are pursuant to our authority under CAA section 112. We consider the regulatory provisions we are proposing under 40 CFR part 63, subpart A to be severable from the regulatory provisions being proposed under 40 CFR part 63, subpart C, as these are two separate regulatory requirements, each of which would operate independently from the other, when finalized.

B. Does this action apply to me?

Categories of entities potentially affected by this proposed action include sources that emit a pollutant that is added to the HAP list. As discussed in more detail in section IV. of this preamble the addition of a pollutant to the HAP list can, for those sources who emit that pollutant, change the source's potential to emit (PTE) such that an area source may become a major source. This change to major source status has regulatory implications that may include CAA operating permitting obligations and applicability of one or

more major source NESHAP. This proposed rule addresses these situations.

C. What is the statutory authority for this action?

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). CAA section 112(a) provides "Definitions" applicable to CAA section 112. A major source of HAP is defined under CAA section 112(a) as any "stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." Stationary sources of HAP that are not major sources are defined as "area sources." Section 112(b)(3)(A) of the CAA allows any person to petition the EPA to modify the CAA section 112(b)(1) list of HAP by adding or deleting a substance.¹ Section 112(d) of the CAA establishes the process for establishing national emissions standards for HAP, commonly referred to as NESHAP but also frequently referred to as either maximum achievable control technology (MACT) standards or generally available control technology (GACT) standards. Section 112(i) of the CAA provides the schedule for compliance with emission standards. Collectively, these statutory provisions and the NESHAP General Provisions codified in 40 CFR part 63, subpart A, provide the framework for establishing emission standards and compliance timing for HAP regulation. These statutory provisions also provide the authority for the EPA to establish requirements to address the immediate regulatory effects when a pollutant is added to the HAP list.

D. Where can I get a copy of this document and other related information?

In addition to being available in the docket (Docket ID No. EPA-HQ-OAR-2022-0441), an electronic copy of this proposal is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at [https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-](https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-additions)

additions. Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key documents at this same website. In addition, a copy of the redline/strikeout version of the regulatory language showing the possible edits needed to incorporate the proposed changes to 40 CFR part 63, subparts A and C is included in the docket for this action (Docket EPA-HQ-OAR-2022-0441). Following signature by the Administrator, the EPA also will post a copy of this document to <https://www.epa.gov/stationary-sources-air-pollution/infrastructure-new-hap-additions>.

II. Basis for the Proposed Action

In the 1990 CAA Amendments, Congress established a list of HAP. These HAP are associated with a wide variety of adverse health effects, including, but not limited to cancer, neurological effects, reproductive effects, and developmental effects. The health effects associated with various HAP differ depending upon the toxicity of the individual HAP and the circumstances of exposure, such as the amount of chemical present, the length of time a person is exposed and the stage of life at which the person is exposed. Prior to the 1990 CAA Amendments, the EPA was required to list HAP for regulation under a risk- and health-based approach, which called for a conclusion that a HAP could "cause or contribute to, an increase in mortality, an increase in serious irreversible, or incapacitating reversible illness." CAA section 112(a)(1), Public Law 91-604, 84 Stat. 1676, 1685 (1970). This approach proved unsatisfactory in achieving the goal of improved public health. In the 1990 CAA Amendments, Congress dispensed with this provision, listed 189 HAP in CAA section 112(b)(1) for regulation under CAA section 112(d), and provided for modifications of the HAP list either by petition or on the Administrator's determination under CAA sections 112(b)(3)(A) and (B).

As relevant here, in CAA section 112(b)(3), Congress provided that any person may petition the Administrator to modify the list of HAP by adding or deleting a pollutant. On January 5, 2022, the EPA published a final rule that added 1-BP to the CAA HAP list, with an effective date of February 4, 2022 (87 FR 393). This addition came as a result of the EPA's determination that the petition we received requesting that we list 1-BP as a HAP provided adequate data to support that 1-BP is an air pollutant and that emissions, ambient concentrations, bioaccumulation or

¹ *La. Env'tl. Action Network v. Env'tl. Prot. Agency*, 955 F.3d 1088, 1098 (D.C. Cir. 2020) ("the Act[] specify[es] processes for adding to or subtracting from the statutory list of hazardous air pollutants, and its direction to EPA [is] to act within 18 months on a petition to modify the list. 42 U.S.C. 7412(b)(3)(A).")

deposition of 1-BP are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects. Before publishing the final rule, EPA published a draft notice of its rationale for granting the petition.² (*American Forest and Paper Ass'n v. E.P.A.*, 294 F.3d 113, 117 n.3 (D.C. Cir. 2002) (“Section 112(b) does not contemplate a formal rulemaking and is not among the sections enumerated in section 307(d)(1) (although other subsections of section 112 are included there).”). This was the first time that a HAP was added to the HAP list that Congress created in 1990. While this was the first action to add a HAP to the list, the EPA is preparing for additional future listings. These listings could come from public petitions, as allowed by CAA section 112(b)(3), through action taken by the Administrator under CAA section 112(b)(2) of the CAA, or through actions or directives from Congress.

Prior to listing 1-BP as a HAP, the EPA evaluated whether any regulatory changes were warranted to the NESHAP program to ensure the effective and efficient implementation of any requirements stemming from the addition of a new pollutant to the HAP list. As part of this review, the EPA published an advanced notice of proposed rulemaking (ANPRM) on June 11, 2021, that sought information about potential NESHAP regulatory requirements resulting from the listing of the first new HAP, 1-BP, as well as other potential implications of the listing of any future HAP (86 FR 31225).

Based on the EPA's review and the public comments received on the ANPRM, the EPA determined that there are several regulatory impacts that could ensue when a pollutant is added to the HAP list. As described in this document, the EPA considered each of these impacts. In some cases, the existing regulatory provisions were sufficient to ensure effective and efficient implementation of the newly listed HAP. In other cases, the EPA determined that the regulations did not adequately address the issues that arise when a pollutant is added to the HAP list. Therefore, for those instances, the EPA is proposing in this action regulatory language to ensure the effective and efficient implementation of a newly listed HAP. The EPA requests comments on whether additional changes are needed to fully and clearly implement provisions related to a new HAP listing.

A. What changes are we proposing?

The EPA evaluated several potential issues related to listing a new HAP. We reviewed whether a new HAP listing has any impact on NESHAP promulgated before the new HAP was added to the list. As discussed below, the EPA concluded that the statute does not support a new HAP being regulated by such a NESHAP unless and until the EPA first evaluates the specific HAP for regulation under CAA section 112 and promulgates standards that include the new HAP. In this action, the EPA is proposing language to be added to 40 CFR part 63, subpart C to clarify this conclusion.

Another question that arose was the period of time allowed for a source to include the newly listed HAP in the source's PTE calculation. Based on the existing language in CAA section 112 and the NESHAP General Provisions (40 CFR part 63, subpart A), the EPA determined that a source must include the new HAP in the source's PTE calculation on the effective date of the listing of the new HAP. This requires including the new HAP in the evaluation of whether the facility is a major source of HAP, or an area source based on the source's PTE calculation.

The addition of the emissions of a newly listed HAP in the calculations of the PTE for a facility could change the facility status from an area source to a major source per the major and area source definitions in CAA section 112. If this occurs, the MSDL facility will face new permitting requirements. In addition, the MSDL facility will need to evaluate whether, due to its major source status, any of its existing emission units are subject to one or more NESHAP that are applicable to emission units located at major sources. For example, in addition to evaluating the NESHAP applicable to the specific industry, the MSDL facility will need to evaluate for purposes of applicability NESHAP that regulate multiple industrial sections such as NESHAP for industrial boilers or reciprocating engines. If applicable NESHAP are identified, the facility would need to evaluate the requirements within each applicable NESHAP and determine compliance requirements. Based on the rationale discussed in section IV.D., this action proposes regulatory language to the NESHAP General Provisions to clarify both the applicability and compliance timelines of newly triggered NESHAP requirements for MSDL facilities.

The EPA also evaluated whether there should be any notification requirements for facilities that emit a newly listed

HAP, including requirements for the facility to notify nearby communities. As discussed in section II.B., a facility already operating under a title V operating permit that triggers applicability of any new NESHAP requirements as it becomes a major source (*i.e.*, MSDL) may need to apply to modify its permit to include such new applicable NESHAP requirements in their permit. MSDL facilities seeking an operating permit for the first time would need to modify or submit a permit application that addresses all applicable requirements consistent with the permitting authority's program. See 40 CFR 70.3(c)(1) and 70.2. A facility that becomes newly subject to a major source NESHAP would also need to submit the initial notification required by the specific applicable NESHAP. This action proposes that initial notifications under 40 CFR part 63, subpart A require some minimal additional information from sources becoming major due to the inclusion of a newly listed HAP in emission calculations.

B. Are there any concurrent changes to Title V Programs in this action?

Section 502(d)(1) of the CAA, 42 U.S.C. paragraph 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 CFR part 70 (hereinafter “title V”). All major stationary sources of air pollution and certain other non-major sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. 42 U.S.C. paragraphs 7661a(a), 7661b.

When a pollutant is added to the HAP list, sources that have the potential to emit the new HAP must include the HAP in calculating the source's potential to emit beginning on the effective date of the listing of the new HAP. The inclusion of a new HAP in the source's PTE can result in a change in classification of the source from area source to major source. A source whose classification changes solely due to the addition of a HAP to the HAP list (*i.e.*, MSDL) will need to determine what, if any, future permitting action must be taken.

Since MSDL facilities are, by definition, not major HAP sources before the HAP listing action, they would be operating as a non-major HAP

² 82 FR 2354 at 2356 (January 9, 2017).

source under a permit or other authorization. As a non-major (*e.g.*, area, synthetic area) HAP source, the facility may have a source specific permit, but could also be operating under a general permit or registration permit. Those MSDL facilities that wish to retain their non-major status will need to consider the newly listed HAP when they seek to reduce their PTE HAP and (unless they opt to become true area for HAP) will need to request enforceable permit terms sufficient to reduce the facility's PTE to below HAP major source levels (*i.e.*, 10 tons of any single HAP and 25 tons of all HAP). Facilities should coordinate all changes in classification with their permitting authority.

If an MSDL facility does not elect to reduce its HAP emissions or PTE to maintain its area source status, as a major source it would be subject to the obligation to obtain a title V operating permit. Under the title V operating permit program, the regulations provide that "[a] timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish." 40 CFR 70.5(a)(1)(i). Because permitting authorities can establish more stringent deadlines than 12 months, MSDL facilities should check with their appropriate title V permitting authority to determine when a timely part 70 application is required.

The EPA is not proposing changes to the title V program or regulations; however, some state, local, and tribal title V programs may need to initiate a conforming program revision to update their implementing regulations, *e.g.*, to include newly listed HAP in their HAP definition if their current regulations do not include newly listed HAP. The EPA encourages state, local, and tribal programs to evaluate whether any regulatory changes are needed to their rules to implement newly listed HAP under their approved program and those programs should consult with their respective EPA regional permitting contact for the program if they have questions. State, local, and tribal programs must keep the EPA apprised of regulatory changes they believe are needed to their approved part 70. 40 CFR 70.4(i). The EPA has determined that the current regulations for state programs (*i.e.*, 40 CFR part 70) and the implementing regulations for federal operating permits (40 CFR part 71) do not need to be revised concurrently with this action because these regulations address permitting requirements in agreement with title V of the CAA,

including permitting prompted when new HAP are listed. In particular, 40 CFR 70.3 and 70.2, require that a state program must provide for permitting of, among other major sources, a "major source under section 112 of the Act" including those with potential to emit a HAP or multiple HAP "which has been listed pursuant to section 112(b) of the Act" above major source thresholds. States and some tribes implement title V permitting under their EPA approved programs for sources in their jurisdictions. For sources subject to the federal operating permits program implemented by the EPA, 40 CFR part 71 includes similar applicability provisions (see *e.g.*, 40 CFR 71.3 and 71.2) inclusive of major sources due to listing and other provisions required for implementing permitting requirements for covered sources. The EPA requests comments on the determination that no edits are required to the title V program for this purpose.

C. What is our rationale for the proposed changes?

This section presents the EPA's proposed rationale for the proposed changes to the NESHAP General Provisions (40 CFR part 63, subpart A) and our proposed conclusions regarding key issues and questions related to listing of new HAP. The issues and questions, along with our proposed conclusions and rationale, are discussed individually below.

1. Are newly listed HAP regulated under NESHAP promulgated before the effective date of the listing?

In the June 11, 2021, ANPRM addressing the addition of 1-BP to the HAP list, the EPA raised the question of whether an existing NESHAP should apply to a newly listed HAP on the effective date of the HAP listing. The ANPRM solicited data and comments on the potential regulatory impacts of the addition of a HAP to the HAP list.³

Because this was the first time the EPA was adding a pollutant to the HAP list, the ANPRM discussed several potential issues that could result from the addition of a pollutant to the CAA section 112 HAP list. One question the EPA raised in the ANPRM was whether a newly listed HAP is regulated under any NESHAP that is in existence on the effective date of the newly listed HAP. In the ANPRM, the EPA more fully discussed this question and provided an example of numeric limits in coating rules that are often based on a limitation on the amount of organic HAP per unit. The example was whether the addition

of new pollutant to the HAP list could require counting emissions of the new HAP in compliance calculations for many NESHAP for coating operations. This is because in most instances these coatings NESHAP typically define HAP by a direct reference to the HAP list published in the 1990 CAA and as modified pursuant to section 112(b). We noted that any modifications to the HAP list are included in 40 CFR part 63, subpart C. In the ANPRM, the EPA requested comment on whether a newly listed HAP should be regulated under previously existing NESHAP.

On January 5, 2022, the EPA published a final rule that added 1-BP to the HAP list (87 FR 393). Based on our consideration of the comments on the ANPRM and the EPA's own review of statutory requirements, the EPA concluded that a newly listed HAP is not regulated under existing NESHAP and stated that the final rule would "have no direct immediate impacts under 40 CFR part 63 on emissions of 1-BP."⁴

The conclusion that existing NESHAP do not regulate a newly listed HAP is consistent with CAA section 112. First, CAA section 112(e)(4) states that "no action of the Administrator adding a pollutant to the list under subsection (b) or listing a source category or subcategory under subsection 112(c) shall be a final agency action subject to judicial review, except that any such action may be reviewed under such section 7607 [section 307] of this title when the Administrator issues emission standards for such pollutant or category." This language, by establishing two distinct steps, supports the EPA's conclusion that previously promulgated NESHAP do not regulate newly listed HAP.⁵ Rather it is only after the EPA establishes new standards or revises previous standards to include the newly listed HAP (for instance, adding a newly listed organic HAP to a standard that covers total organic HAP) that the listing of a new HAP is subject to review.

Second, having listed the new HAP using the process in CAA section 112(b), CAA section 112(d) sets out prescriptive procedures for establishing emissions standards for major sources. These statutory procedures include that a

⁴ 87 FR 395.

⁵ See also *Util. Air Regul. Grp. v. E.P.A.*, No. 01-1074, 2001 WL 936363, at *1 (D.C. Cir. July 26, 2001) (dismissing challenge to listing of coal- and oil-fired electric utility steam generating units as a source category under Section 112(c) for lack of jurisdiction). "Section 112(e)(4) of the Clean Air Act provides that judicial review of the listing of a source category under section 112(c) of the Act is not available until after emission standards are issued. See 42 U.S.C. 7412(e)(4)."

³ 86 FR 31225.

standard must be established for each HAP—a process that cannot occur until the EPA gathers sufficient information about which sources emit the HAP and the emission rate of the HAP.⁶ Moreover, CAA section 112(d) requires that the MACT floor be based on the emission level actually achieved by the best performing sources.⁷ As part of the MACT determination, we must also evaluate whether options more stringent than the floor are justified under the statute. This task thus requires not only the emissions information of the new HAP from sources, but a review of information related to the potential emission controls and systems of controls that are, or could be, employed to reduce the emissions of the newly listed HAP. Because the EPA did not consider a pollutant that was not a HAP at the time it established existing NESHAP, the statutory process for establishing a standard for the new HAP has not been followed; therefore, the conclusion that existing NESHAP do not regulate a newly listed HAP is consistent with the statute.

In summary, the conclusion that a newly listed HAP is not regulated by any standards promulgated prior to the HAP being listed is consistent with this statutorily required and well-ordered process whereby under CAA section 112(b) the EPA lists a new HAP; CAA section 112(d) requires the EPA to gather information (e.g., inventories and ranking of best performers) sufficient to establish new or revised standards for the newly listed HAP; and CAA section 112(e) allows for review of the listing when the new or revised emission standards is finalized.

The EPA is requesting comment on whether regulatory text should be included in either the NESHAP General Provisions, 40 CFR part 63, subpart A or in part 63, subpart C, where new HAP are listed, to make it clear that a new HAP is not regulated by a previously promulgated NESHAP until the NESHAP is reviewed and the inclusion of the new HAP is fully evaluated for regulation. A redline/strike out version of proposed regulatory language for the

preferred options is included in the docket for this action.

2. When must a newly listed HAP be included in emission estimates and what are the potential regulatory implications?

While the emissions of a newly listed HAP are not regulated by NESHAP promulgated before the HAP was listed, the pollutant listed becomes a HAP on the effective date of the listing. On and after the effective date of the listing of a new HAP, it must be included in calculating the facility's actual emissions and PTE for the purposes of determining whether a facility is a major source or area source under Part 63.⁸ This is because, under CAA section 112(a)(1) a major source is “any stationary source or group of stationary sources . . . that emits or has the potential to emit considering controls, in the aggregate, 10 tpy or more of any hazardous air pollutant or 25 tpy or more of any combination of hazardous air pollutants.”⁹ (Emphasis added)

The inclusion of a new HAP could change a facility's status from an area source to a major source of HAP. If the sole reason for a facility's status change from area to major is the inclusion of the newly listed HAP, the facility would be considered a “major source due to listing” or “MSDL” facility. For the reasons discussed below MSDL facilities, as a result of becoming major on the effective date of the listing of a new HAP, would become subject to any applicable standards covering HAP other than the newly listed HAP in existing major source NESHAP. The EPA specifically requests comments and data on whether, as a result of the listing of a new HAP, there are other sources that are directly impacted by the listing of a new HAP.

a. Permitting Impacts for Sources and Programs

All major sources must operate in agreement with a title V operating permit. Consequently, upon listing of a new HAP, MSDL facilities will need to determine what, if any, future permitting action such as application for an initial title V operating permit or permit revision or an application for other type of permit must be taken. For example, a source with an individual PTE limit for HAP, issued in a minor source permit, would have to ensure the supporting data and calculations of

actual HAP emissions used to verify the PTE limit account for newly listed HAP emissions. Any required permitting action depends on the individual situation as governed by the permitting authority rules; thus, sources are advised to coordinate these actions with the permitting authority with jurisdiction for the source. Facilities that wish to operate as area sources of HAP and avoid applicability of major source NESHAP requirements could do so at any time and must obtain legally and practically enforceable PTE HAP restrictions below major source levels available under their permitting authority programs. This does not include true area sources, which do not need enforceable PTE limits.

However, if the MSDL facility does not wish to pursue non-major source status, as a major source of HAP they will be subject to the title V operating permit program. Under the title V operating permit program regulations “A timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish.” 70.5(a)(1)(i). Because permitting authorities can establish different deadlines, MSDL facilities should check with their appropriate title V permitting authority to determine exactly when a timely Part 70 application is required.

The title V regulations are inclusive of all listed HAP; however, some state, local, and tribal title V programs may need to initiate a conforming program revision to update their implementing regulations, e.g., to include newly listed HAP in their HAP definition if their current regulations do not include newly listed HAP. The EPA encourages state, local, and tribal programs to evaluate whether any regulatory changes are needed to their rules to implement newly listed HAP under their approved program and those programs should consult with their respective regional permitting contact for the program if they have questions. State, local, and tribal programs must keep the EPA apprised of regulatory changes they believe are needed to their approved part 70 program. 40 CFR 70.4(i).

Also, the EPA is aware that some permitting authority programs for limiting PTE for categories of similar sources such as general permits, permits by rule, source registrations currently in use for limiting PTE HAP may not be authorized for newly listed HAP and may need revisions. The EPA encourages permitting authorities to

⁶ *U.S. Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016) (“EPA’s pollutant-by-pollutant approach [to standard setting] is a reasonable interpretation and application of the statute.”); *National Lime Association v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000). (EPA must set standards under section 112(d) for each listed HAP. EPA has a “clear statutory obligation to set emissions standards for each listed HAP.”).

⁷ *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d at 86 (“EPA may not deviate from section 7413(d)(3)’s requirement that floors reflect what the best performers actually achieve by claiming that floors must be achievable by all sources using MACT technology.”).

⁸ 40 CFR 63.2.

⁹ “In the context of the CAA, ‘any’ has an expansive meaning that is, ‘one or some indiscriminately of whatever kind.’” *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006)(citations omitted).

review their programs for issuing PTE limits for HAP sources and ensure they have adequate regulatory authority as needed to implement legally and practicably enforceable PTE limits that include newly listed HAP.

b. Part 63 NESHAP

All sources that become MSDL facilities will need to evaluate whether any major source NESHAP apply to their operations. In some cases, there may be a transition from an area source NESHAP to a major source NESHAP for the same source category. For example, an MSDL facility may have been subject to the Boiler NESHAP for area sources prior to becoming an MSDL facility but would now become subject to the Boiler NESHAP for major sources.

In addition to a larger number of potentially applicable rules, NESHAP for major sources tend to be more comprehensive than most area source NESHAP, covering more pollutants and emission sources and are generally at least as stringent as area source requirements due to differing requirements under the CAA.¹⁰ The EPA recognizes that there are some unique questions that arise for MSDL facilities when considering the application of a NESHAP that was developed before the MSDL facility became a major source. Two main questions that the EPA evaluated are: (1) what standards apply to MSDL facilities (whether new source or existing source standards apply to MSDL facilities)? and (2) what compliance time should be provided for the MSDL facilities?

1. What standards apply to MSDL facilities?

Section 112 of the CAA and its implementing regulations distinguish between “new source” and “existing source” for the purpose of both the stringency of the emission standard and the time allowed for compliance with applicable standards. Specifically, CAA section 112(a)(4) defines a new source as a source that commenced construction or reconstruction after the Administrator first proposes regulations under section 112, while CAA section 112(a)(10) defines an existing source as any stationary source other than a new source. The EPA has also explained that the phrase “first proposes” in CAA section 112(a)(4) is somewhat ambiguous such that it could be viewed as referring to different dates in different

circumstances. For example, it could be read as the first time the Agency proposes any standards for a source category, the first time the Agency proposes standards under a particular rulemaking record for a source category, or the first time the Agency proposes a particular standard.¹¹ The determination of whether the standard that applies to a particular source is for “new” or “existing” sources is also important to determining the compliance deadline.

Current rules also address cases where, after the initial promulgation of a NESHAP, an area source makes the decision to increase its emissions such that it becomes a major source. Language is included in the NESHAP General Provisions at 40 CFR 63.6(b)(7) and (c)(5), as well as in many individual NESHAP, to address the consequences of this decision made by an individual facility. In this situation, the EPA has determined that the designation of “new source” and “existing source” should remain defined by the dates given in each individual NESHAP and that does not change when a source reclassifies from area to major source.¹²

However, the NESHAP General Provisions do not address the unique situation that arises when a new HAP is listed and an area source becomes a major source solely due to the addition of a new HAP when calculating the source’s PTE (*i.e.*, MSDL facilities).¹³ In this action, the EPA is requesting comment on whether to amend the NESHAP General Provisions to specifically address this issue. In addressing this issue, the EPA has considered two alternatives: (1) as done with non-MSDL major sources facilities, determine whether an affected source was new or existing based on each specific NESHAP for MSDL facilities, or (2) designate all affected sources for newly applicable NESHAP at an MSDL facility to be existing affected sources. While the EPA is proposing the second option, *i.e.*, all MSDL facilities should

be considered existing sources, both alternatives are discussed below.

Under the first alternative, an MSDL facility would continue to refer to each individual NESHAP and compare the date of construction of an affected source to the date an individual NESHAP was proposed. Under this approach, the determination of “existing source” and “new source” would be the same regardless of when a facility became major and regardless of how a facility became major (*i.e.*, through their own action or through an EPA action of HAP listing). If the EPA were to finalize this alternative, no changes would be made to 40 CFR part 63, subpart A, § 63.1 (Applicability). However, the EPA could provide a clarifying statement in the current regulatory text with respect to MSDL facilities. The EPA requests comments on whether such clarifying statements would be necessary or helpful.

The EPA has some concerns about the potential impacts for MSDL facilities that would be considered new sources under this first alternative. These concerns center around (1) the lack of notice provided to the MSDL that it is becoming subject to major source requirements, and (2) the action that created the major source requirement was solely from the addition of a new HAP.

A newly listed pollutant becomes a HAP on the effective date of the listing. As defined, a MSDL facility becomes a major source solely due to the EPA action to add a new HAP to the HAP list. This accounting is required because under CAA section 112(a)(1), a facility must include “any hazardous air pollutant” in calculating the potential to emit for the purposes of determining whether it is a major source under this section of the Act. Thus, on and after the effective date of the listing of a new HAP, a facility must include such HAP in the actual emissions and potential to emit calculations.¹⁴ Within each major source of HAP (defined at the facility level) there could be one or more affected sources, and where there are more than one affected source each one could be either a new or an existing source. Section 112(a)(4) of the CAA defines a new source as a source that commenced construction or reconstruction after the Administrator first proposes regulations under this section, while CAA section 112(a)(10) defines an existing source as any stationary source other than a new source. As previously noted above, “first proposes” could be read to mean the first time the Agency proposes any

¹¹ See for example, National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants (78 FR 10006, 10025; February 12, 2013).

¹² See 85 FR 73854, 73867 (Nov. 19, 2020) (Revisions to 40 CFR part 63, subpart A to address the issue of compliance issues for sources that make the decision to increase their potential to emit and reclassify from area source status to major source status).

¹³ In 1994 EPA first promulgated the NESHAP General Provisions, which are codified in 40 CFR part 63, subpart A, and which provide the general framework for establishing emission standards and compliance timing for HAP regulations (59 FR 12408; March 16, 1994).

¹⁰ In particular, CAA section 112(d)(5) allows the EPA to set standards for area source categories based on “generally available control technology or management practices,” which may be less stringent than the standards required for major sources under sections 112(d) or 112(f).

¹⁴ CAA sections 112(a)(1); 40 CFR 63.2.

standards for a source category, the first time the Agency proposes standards under a particular rulemaking record for a source category, or the first time the Agency proposes a particular standard.¹⁵ Here, the EPA's listing of a new HAP is not the proposal of standards under relevant statutory provisions, and as previously explained, existing NESHAP do not regulate a newly listed HAP. It also bears note that there is no specific period for promulgating standards for newly listed HAPs, under CAA section 112(b)(1). Additionally, the CAA distinction between new and existing sources is reasonably understood to be predicated on some basic principles, including that a new source can potentially be held to more stringent compliance requirements than existing ones. In some cases, new source requirements are based on the ability of these sources to design processes to accommodate air pollution control systems.¹⁶ The facility choosing to construct or reconstruct a new affected source can consider the applicable standards and other requirements in making both the technical and economic decisions that surround the evaluation to construct or not construct the emissions unit. Legislative history from the 1990 CAA Amendments also suggests that "the test of section 112(a)(4) as to whether a source is commencing construction or reconstruction is physical and economic, rather than emissions related." S. Rep. No. 229, 101st Cong. 1st Sess. 1989, 1990 U.S.C.A.N. at 3385, 1989 WL 236970.¹⁷

In contrast, a MSDL facility is newly subject to standards that were published long before the HAP listing action that resulted in the facility exceeding the major source threshold. But when the facility was being constructed as an area source, the source had no reason to contemplate the applicability of major source NESHAP.¹⁸ As discussed above,

notice of the requirements at the time that the facility is constructed or reconstructed is a key distinction between "new" and "existing" emission standards under CAA section 112 and the NESHAP regulations. This is because CAA section 112(a)(4) defines a new source as a source that commenced construction or reconstruction after the Administrator proposes regulations for the applicable source category. The notice of a proposed major source NESHAP allows a source to consider the proposed standard when considering the design of or constructing a potentially new affected emissions unit. Having this notice allows the source to alter the design to eliminate the emissions of the regulated HAP or alter the design of the emissions unit to ensure that when the emission unit commences operation it can meet the "new" source limit. This is because a MSDL facility that was already operating when the EPA lists a new HAP is not aware at the time of construction or reconstruction that it would subsequently be subject to a major source NESHAP, since no standard applied at that time. Therefore, it could be more appropriate to treat such source as an existing source.

Moreover, a listing action is not subject to the robust public notice and comment requirements provided in CAA section 307(d).¹⁹ The EPA acknowledges that the Agency could provide some degree of public notice before a new HAP is listed, with one or more documents in the **Federal Register** because "in most instances, even where there is no statutory requirement to take comment, the EPA solicits public comment on actions it is contemplating."²⁰ But these documents would typically address the substantive requirements for listing a substance as a HAP and would likely provide little or no information on sources that would be impacted by the listing decision.²¹

whether a new or revised emission limit warrants the re-designation of the new affected source date, the EPA must consider several factors.

¹⁹ *American Forest and Paper Ass'n v. EPA*, 294 F.3d 113, 117 n.3 (D.C. Cir. 2002) ("CAA section 307(d)(9), however, by its terms applies only to 'rulemakings' pursuant to the CAA sections enumerated in section 307(d)(1), 42 U.S.C. 7607(d)(1). Section 112(b) does not contemplate a formal rulemaking and is not among the sections enumerated in section 307(d)(1) (although other subsections of section 112 are included there.)."

²⁰ 68 FR 28198, June 4, 1996.

²¹ CAA section 112(b)(3)(A) requires the Administrator to either grant or deny a petition within 18 months of the receipt of a complete petition by publishing a written explanation of the reasons for the Administrator's decision. See for example 82 FR 2354, January 9, 2017 (draft notice of the rationale for granting petitions to add n-propyl bromide to the HAP list); *La. Envtl. Action*

Additionally, such notices would also have been published years after a facility constructed or reconstructed their affected source at an area source facility. Further, where the Agency lists a HAP in response to a petition, the Agency would be unable to impose compliance obligations for that HAP considering that not all affected sources were involved in the listing action and as such would be precluded from challenging the listing decision as specified by section 112(e)(4) until the Agency promulgates standards for the newly listed HAP.²²

Further, not only is a MSDL facility not able to plan accordingly to meet the "new" source standard, but there is also a possibility that the source, already in operation, cannot, as a technological matter, comply with the standard for new sources. For example, during the development of the NESHAP for Polyvinyl Chloride and Copolymers Production, the EPA acknowledged that due to the stringency difference between the new source and existing source standards that it might not be technically possible for an existing source to meet the new source standard. In the final rule the EPA modified the definition of existing source to ensure that existing sources were not subject to the new source standard, which was impossible for them to meet. See 77 FR 22848 (April 17, 2002).

Finally, unlike the situation where an area source becomes a major source (by increasing its HAP emissions or potential to emit), a MSDL facility becomes a major source due to EPA's listing of a new HAP. As also previously explained, a MSDL facility has no direct notice as to the applicability of the major source NESHAP and more importantly as to the applicability of any "new" source standard for major

Network v. Envtl. Prot. Agency, 955 F.3d 1088, 1098 (D.C. Cir. 2020) ("the Act [] specify[es] processes for adding to or subtracting from the statutory list of hazardous air pollutants, and its direction to EPA [is] to act within 18 months on a petition to modify the list. 42 U.S.C. 7412(b)(3)(A).")

²² "Section 112(e)(4) of the Clean Air Act provides that judicial review of the listing of a source category under section 112(c) of the Act is not available until after emission standards are issued. See 42 U.S.C. 7412(e)(4). This court therefore lacks jurisdiction at this time to review the determination of the Environmental Protection Agency ("EPA") that regulation of coal- and oil-fired electric utility steam generating units is appropriate and necessary, and that such units should be listed as a source category under section 112(c)." See *Util. Air Regul. Grp. v. E.P.A.*, No. 01-1074, 2001 WL 936363, at *1 (D.C. Cir. July 26, 2001). See also, *Conference Group, LLC v. Federal Communications Commission*, 720 F.3d 957 (D.C. Cir. 2013). (Nonparty to adjudication lacks standing to challenge merits of adjudication). But see *Teva Pharma. v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010) (Allowing challenge where there was imminent harm or injury from Agency decision).

¹⁵ See for example, National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants (78 FR 10006, 10025; February 12, 2013).

¹⁶ For new sources, "the maximum degree of reduction in emissions that is deemed achievable . . . shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source." CAA section 112(d)(3).

¹⁷ "It does not require increases in emissions or changes in the operation of previously existing facilities to be triggered. Since there is no threshold of emissions increase, it is not possible for an existing source adding new facilities to avoid being considered new by 'netting out' or reducing so that the increase is below some threshold of significance." *Id.*

¹⁸ EPA also notes that the definition of a new affected source is made within each emission standard. When making the determination as to

sources as contemplated under CAA section 112(a)(4). Therefore, the MSDL facility cannot develop plans to comply with the standard to which it was not subject before it becomes applicable and could potentially be in non-compliance immediately upon the effective date of the listing of the new HAP in the absence of any changes proposed in this action. This would mean that some rules, while not applicable to the facility when the rule was proposed, now apply due to the EPA listing action and through no action of the facility. Moreover, it is not the promulgation of emissions standards under relevant statutory provisions and precedent for the newly listed HAP that has resulted in a status change. Rather, it is the HAP listing itself. This would mean that some rules, while not applicable to the facility when the rule was proposed, now apply due to the EPA listing action and through no action of the facility.

These concerns lead the EPA to also favor the alternative option where all newly impacted affected sources at MSDL facilities would be treated as existing sources.

Under this preferred option, the EPA would treat affected sources at MSDL facilities as existing affected sources because affected sources at MSDL facilities that might otherwise be considered “new” under a NESHAP-specific evaluation are not new sources as contemplated under CAA section 112(a)(4) in the circumstance where the source becomes a major source due to EPA’s listing of a new HAP. First, the increase in the facilities’ emissions or potential to emit that caused the facility to become a major source was caused solely by an EPA action to list a HAP and not based on any action by the facility to change its method of operation, add new equipment, or change any material throughput. Second, the facility was already operating the affected sources when the EPA’s listing action, which is not the promulgation of emissions standards under relevant statutory provisions and precedent, resulted in a status change.²³ When considering the construction for these sources, the facility may have evaluated applicable requirements that would apply to them as a non-major source. Third, these sources were not afforded advance notice to tailor

construction plans to meet the new source requirements for major sources, but instead would be required to develop a compliance strategy on already-constructed emission sources.

In conclusion, the EPA has considered both options discussed above and is proposing that all affected facilities at MSDL facilities that become subject to major source requirements solely due to the listing of a new HAP should be considered existing sources. Under this option, regulatory language would be added to 40 CFR part 63, subpart A, § 63.1(c) applicability requirements and a definition of MSDL would be added to § 63.2. The EPA requests comments on all aspects of both alternatives presented above, as well as on the proposed selection of treating all MSDL facilities as existing sources. All significant comments received on issues related to effects of HAP listing on MSDL facilities during the public comment period will be considered.

2. When does an MSDL facility have to be in compliance with new requirements?

When an MSDL facility triggers existing source NESHAP requirements under our proposed approach described in section II.C.3., there is an additional question of the appropriate compliance date. Because the NESHAP of concern have already been promulgated, typically many years in the past, it is likely that most of the compliance dates will have passed for both existing and new affected sources. The EPA understands that a past compliance date would indicate that a facility would need to be in compliance on the day the NESHAP is triggered; in this case, the day the HAP listing is effective. The EPA does not view this outcome as necessarily the most practical conclusion flowing from the overall intent and reading of CAA section 112 as well as rulemakings that implement CAA section 112. As this outcome can create significant, immediate compliance issues for facilities that have already been constructed, the EPA evaluated several options for establishing compliance dates for MSDL facilities.

The General Provisions, 40 CFR part 63, subpart A, include requirements for facilities that increase their emissions (or potential to emit) to major source levels. The provision in 40 CFR 63.6(b)(7) provides that new affected sources must comply with all requirements of a standard at start-up of the source.²⁴ On

the other hand, for existing sources, the provision in 40 CFR 63.6(c)(5) provides that a facility has the amount of time listed in a specific NESHAP for sources increasing emissions to major or “equivalent to the compliance period specified in the relevant standard for existing sources in existence at the time the standard becomes effective.”²⁵ Several NESHAP include the provisions mentioned in 40 CFR 63.6(c)(5) for when an area source becomes a major source. Most, but not all, of these provisions tend to treat new sources very differently from existing sources, by providing time to come into compliance for existing affected sources that become major sources, but typically requiring immediate compliance for new sources that become major sources.

The EPA reviewed these provisions for potential applicability to MSDL facility compliance times. The EPA determined that the current language in 40 CFR 63.6(b)(7), 63.6(c)(5) and the area- to- major language in individual NESHAP were not developed with MSDL facilities in mind and are therefore not applicable to MSDL facilities. Therefore, the EPA is proposing that the NESHAP General Provisions at 40 CFR 63.6(d) be revised to address the compliance timing for MSDL facilities. As individual NESHAP are reviewed, the EPA can assess whether additional provisions addressing MSDL facilities are warranted. Any NESHAP-specific MSDL provision would supersede provisions promulgated in the General Provisions.

The EPA is considering four possible approaches for establishing compliance schedules for MSDL facilities that trigger major source NESHAP: (a) Maintain the compliance deadlines in individual NESHAP, even past dates, and require all facilities to work with their regulatory authority to come into compliance; (b) Establish a compliance deadline consistent with time provided to existing sources under the applicable individual NESHAP; (c) Provide a single compliance timeline for MSDL facilities that have become subject to major source requirements, regardless of the times provided in the individual NESHAP; and (d) Provide compliance

promulgated under CAA section 112(d)(2) and (3) is on the effective date of the NESHAP or upon startup, whichever is later.

²⁵ For existing sources, CAA section 112(i)(3) provides there shall be compliance “as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard. . . .” (“Section 112(i)(3)’s 3-year maximum compliance period applies generally to any emission standard . . . promulgated under [section 112].” *Association of Battery Recyclers v. EPA*, 716 F.3d 667, 672 (D.C. Cir. 2013) (brackets in original)).

²³ Emissions standards “mean[s] a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.” CAA section 302(k).

²⁴ For new affected sources, CAA section 112(i) provides that compliance with standards

deadlines based on the types of emission limitations or requirements.

Each of these options is discussed in more detail below. While the EPA is proposing to provide compliance deadlines based on the types of emission limitations or requirements (option d in this list), the EPA requests comments on each of the following options and may select any of these options in the final rule, depending on comments received and the EPA's final analyses.

a. Maintain Compliance Schedules in Individual NESHAP

Under this alternative, the EPA would make no changes to the NESHAP General Provisions (40 CFR part 63, subpart A) and would instead allow compliance dates in the individual NESHAP to remain the applicable compliance dates. Under this approach an MSDL facility would likely be out of compliance with any major source NESHAP that applies on the effective date of the listing of a new HAP. This is because the majority of major source NESHAP have compliance dates that pre-date the effective date of the newly listed HAP.

This approach would likely lead to the earliest requirements for emission reductions by MSDL facilities, as they may alter their operations or work practices to either minimize emissions or work with their regulatory authority to address their non-compliance status. Emission reduction will not include direct emission control requirements for the newly listed HAP, as the EPA must first promulgate standards for such HAP. It would, however, result in emissions reductions of other regulated HAP as the facility complies with the applicable NESHAP. As previously discussed, above, this approach is predicated on the assumption that facilities are aware of the EPA actions that may impact their CAA compliance status since pre-notice is provided by the EPA's prior **Federal Register** documents on potential listings.²⁶

b. Provide a Timeline Equivalent to the Time Provided for Initial Compliance

Under this alternative, the EPA is considering whether the compliance time provided to MSDL sources for a specific NESHAP should be equivalent to the initial time provided to existing affected sources in that NESHAP. This approach would acknowledge the source category-specific evaluation of

appropriate compliance time for the specific rule.

The EPA reviewed numerous existing NESHAP and determined that the majority of NESHAP provided three years for existing sources to come into compliance with the standards. The specific justifications for allowing three years for existing sources to comply varied from NESHAP to NESHAP but were all predicated on a determination that three years was as expeditious as possible for those facilities.

This option would call for the EPA to include in the NESHAP General Provisions regulatory language similar to existing language at 40 CFR 63.6(c)(5). The regulatory language in the NESHAP General Provisions would provide MSDL facilities a "period of time to comply with the relevant emission standard that is equivalent to the compliance period specified in the relevant standard for existing sources" and would apply in the absence of any MSDL-specific language in individual NESHAP."

It should be noted that, at present, there are no MSDL-specific provisions in any individual NESHAP. Language currently in the General Provisions and NESHAP refers only to area sources that become major sources through a facility's own action that causes an increase in emissions or in their potential to emit. If no MSDL-specific language is included in a specific NESHAP, then the time provided by the new MSDL language in the General Provision will dictate the requirements.

As discussed in section II.C.3. (What Standards Apply to MSDL Facilities?), the EPA is proposing to define all affected sources at MSDL facilities as existing affected sources for the purposes of determining the applicable emission standards. If the EPA were to instead promulgate the option that would require some sources to meet the new source emission limits, the EPA is still proposing to provide time for all MSDL facilities to come into compliance under this option. In this proposal, the EPA is considering whether providing some amount of compliance time—as typically done for existing sources—is appropriate for all MSDL sources. Specifically, under this option, all MSDL sources (including new sources) would be provided a time period equivalent to the time period provided to existing affected sources in the specific NESHAP.

As discussed below, this is not the option that the EPA is proposing because we believe the final option in this list best balances the EPA's desire to obtain emission reductions as soon as practicable, but also allow time required

for a facility to effectively and efficiently come into compliance with potentially multiple requirements; however, the EPA requests comments and supporting information on this option.

c. Provide a Single Timeline for all NESHAP Newly Triggered for MSDL Facilities

Under this alternative, the EPA is considering whether a single compliance schedule should be provided for any new requirements at an MSDL facility when a new HAP is listed. As discussed above, the EPA conducted a review of current NESHAP and determined that the predominant compliance time provided to any impacted existing affected source is 3 years after a rule is promulgated. Based on this review, the EPA is considering whether to provide up to three years for all MSDL facilities to come into compliance with all newly applicable requirements.

The EPA could consider a set deadline that is less than three years. In many instances, the EPA considered the availability of resources in assessing the amount of time needed to comply with a NESHAP. These resources could include the lack of enough vendors to supply the expected air pollution control devices in less than three years. The EPA does not expect that a significant number of sources that would draw on the same resources (*e.g.*, the same air pollution control vendor) will become MSDL sources and solicits comment on whether this assumption is reasonable. To the extent that up to three years was provided in a specific NESHAP to account for the resource drain, it could be reasonable to consider a different set time period under this requirement for MSDL affected sources.

The EPA is aware that an MSDL facility has the potential to trigger more than one NESHAP and associated requirements, and these different NESHAP could provide for different compliance time periods. The EPA is considering whether providing a single date would enable a facility to develop a comprehensive strategy to comply with all newly applicable major source NESHAP requirements. A single date would also provide absolute clarity to all stakeholders as to when compliance was required, regardless of the NESHAP subpart that becomes applicable to them. Under this option, the EPA could select the longest time period allowed in the various regulations (*i.e.*, 3 years after promulgation date), the shortest time period (*i.e.*, immediate compliance required for new sources), or some time in between. The EPA requests

²⁶ CAA section 112(b)(3)(A) merely calls for the Administrator to either grant or deny a petition within 18 months of the receipt of a complete petition by publishing a written explanation of the reasons for the Administrator's decision.

comments on the potential for any of these time periods.

The EPA recognizes that this option would allow some facilities more time than was allowed under the original NESHAP. However, this option recognizes that a facility may need to develop a compliance strategy for multiple NESHAP that may involve different types of compliance requirements. For example, a facility may need to design, order, install and activate an air pollution control device to comply with one NESHAP, and may need to implement operational changes, or work practice requirements, for a different NESHAP. Providing the facility with the ability to strategize their overall compliance approach might be significantly more efficient than requiring separate dates for simultaneously triggered requirements.

This is not the option we are proposing in this document. While this approach may be reasonable when considering a facility could have multiple new requirements, the EPA believes that the chosen option best balances a reasonable time for facilities and the need to not unnecessarily delay the implementation of certain practices or technologies that would more quickly reduce emissions and associated risks. However, the EPA requests comments on this option, including whether it should be the selected option and whether a different compliance timeframe should be selected, *e.g.*, within 2 years or within 18 months under this option. In addition, we ask for comment on whether the EPA, if it were to promulgate this option, should include additional conditions. For example, the EPA could provide an overall compliance timeframe of “no later than 3 years,” but require that a MSDL facility demonstrate that any compliance date after 2 years would have to be justified to and approved by the Administrator (or delegated authority), unless compliance for a specific requirement required the installation of equipment, such as air pollution control devices.

If the EPA were to finalize regulatory text that included some MSDL facilities being required to meet new source requirements, the EPA might still provide that all facilities be provided with the identical time allowance for compliance. The EPA solicits comments on this conclusion, as well as comments on alternatives that should be considered.

d. Provide Compliance Deadlines Based on the Types of Emission Limitations or Requirements

As discussed above, the majority of existing NESHAP have provided the 3 years to comply, as allowed under CAA section 112(i)(3)(A). However, the EPA also has a long-standing history of providing shorter periods to ensure that the compliance requirements are consistent with statutory requirements. These shorter compliance periods are based, in part, on the type of emission standard. Where the emission standard is a work practice or does not require installation of add-on emission control device, the EPA has, consistent with CAA section 112(i)(3)(A) that requires compliance “as expeditiously as practicable,” required compliance in less than 3 years. For example, in establishing the 1995 NESHAP for Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, the EPA stated, “The EPA believes that the 1-year timeframe for decorative chromium electroplaters is sufficient because, based on the EPA’s survey data, 80 percent of existing sources already use fume suppressants and very few will need to install add-on air pollution control devices.” (60 FR 4948; January 25, 1995). In the 1994 NESHAP for Magnetic Tape Manufacturing Operations, the EPA provided 2 years to comply unless a new control device was needed. (December 15, 1994). In the 2004 Iron and Steel NESHAP the EPA required existing iron and steel foundries to comply with the scrap selection and inspection program within 1 year of the effective date of the final rule because no controls were required, and emission reductions would be achieved as expeditiously as practicable (69 FR 21906; April 22, 2004).

Based on the EPA’s history of establishing compliance deadlines for existing sources based on the type of emission standard, the EPA is proposing that the compliance deadline for MSDL facilities should be based on the type of emission standard applicable to the facility. For example, if the applicable emission standard requires the installation of add-on controls the compliance deadline would be longer (*e.g.*, a 2-year compliance deadline starting from the date the source becomes major due to the listing of a new HAP) as compared with an emission standard that does not require the addition of controls (*e.g.*, 1 year from the date the source becomes major due to listing of a new HAP if the emission standard is a work practice). The EPA is requesting comment on the

appropriate compliance deadline (*e.g.*, from 0 up to 3 years) depending on the type of emission standard. The EPA acknowledges that the CAA allows title V permitting authorities to grant sources, on a case-by-case basis, extensions to the compliance time of up to 1 year if such time is needed for the installation of controls. See CAA section 112(i)(4)(i)(A). Permitting authorities are already familiar with, and in many cases have experience with, applying the 1-year extension authority under CAA section 112(i)(4)(A) as the provision applies to all NESHAP. This option will remain available to MSDL facilities.

In addition to the long-standing compliance deadline differentiation based on the type of emission standard, the EPA believes that establishing shorter compliance deadlines for MSDL facilities is reasonable because some of the reasons for providing the full 3 years for existing sources under initial NESHAP will not exist for MSDL facilities. For example, during the development of the NESHAP for the Industrial, Commercial, and Institutional Boilers and Process Heaters, commenters expressed concern about the compliance deadline for existing sources stating that a “large number of sources that will be competing for the needed resources and materials from engineering consultants, permitting authorities, equipment vendors, construction contractors, financial institutions, and other critical suppliers.” (78 FR 7138; January 31, 2013). The EPA does not expect the number of MSDL facilities following the listing of a new HAP to be similar to the overall number of facilities subject to a NESHAP on its initial promulgation and therefore the resource availability concerns are not expected.

Another factor that supported providing the full 3-year compliance deadline for initial NESHAP was the learning curve associated with implementing standards or installing new controls to an existing process. In contrast, MSDL facilities, by definition, only deal with facilities triggering already existing NESHAP and some of these NESHAP were promulgated over 20 years ago. Therefore, the industry and equipment vendors have already experienced, dealt with, and solved many of the initial application issues associated with applying a NESHAP standard to a source category for the first time. The years of experience gained at applying standards and installing controls within a source category should reduce the time needed to apply the same technology today at MSDL facilities.

The EPA is proposing to provide compliance deadlines based on the types of emission limitations or requirements for MSDL facilities because it provides the optimum balance between acknowledging that some time is needed to develop and implement control strategies for newly applicable NESHAP requirements and the desire to not unnecessarily delay compliance and the resulting emission reductions. The EPA requests comments on the use of this approach and specifically the proposed compliance deadlines of 2 years for facilities that install add-on controls and 1 year for all other standards. The EPA is clarifying that no compliance deadline extension will be provided for NESHAP that have identical requirements for area and major sources, because these facilities would already be complying with the NESHAP before becoming an MSDL facility.

The EPA recognizes that under any of the last three options, there could be situations where there is a possible temporal gap in regulatory coverage for MSDL facilities that were, prior to their MSDL status, subject to an area source NESHAP. For example, a facility that was subject to area source NESHAP prior to their MSDL status might not be subject to any emissions standard during a compliance deadline extension allowed for the newly applicable major source NESHAP.

The EPA is taking comment on what standard should or can apply during this period if a compliance deadline extension is provided. For example, one option the EPA is considering is whether a MSDL facility might be required, either by their existing permit or by a requirement added to this rulemaking, to continue to comply with any pre-existing area source NESHAP until they are in compliance with newly applicable major source NESHAP. This gap-filling approach would prevent any inadvertent increase in emissions that could occur during this compliance extension period.

The EPA also requests comment and specific examples of how this would occur and whether existing area source operating permits would remain enforceable until a new major source permit is issued.

3. Are there any new notification requirements?

The EPA evaluated whether any additional data should be required from facilities when a new HAP is listed. Without any changes, there are two notifications that would be required under existing NESHAP requirements. First, any MSDL facility that requires a

title V operating permit would need to apply for the permit within 12 months of becoming subject to the operating permit requirement. This application would likely be required to include substantive data about the newly listed HAP, including a description of the emission sources, the quantity of emissions, and whether any other requirements were triggered by becoming a major source. Presumably this would include the identification of any major source NESHAP that is now applicable to the facility. As with other title V operating permit requirements, the EPA is not proposing to make any changes to the existing language.

Second, an MSDL facility that triggers one or more major source NESHAP would become subject to the requirement to submit an initial notification under each newly applicable NESHAP. These requirements are specified in each NESHAP and in the General Provisions to part 63, including the details of the information that must be included and where the notification must be sent. Typically, these notifications are required within 180 days of becoming subject to a NESHAP, so would be required before the facility is required to submit a title V operating permit application, if also required. A permit application would typically be allowed to serve as the initial notification, if it is submitted within the timeframe required by the NESHAP and includes all of the information required by the specific rule. In the absence of requirements listed in a specific NESHAP, the initial notification content requirements are dictated by the provision in 40 CFR 63.9(b). The EPA reviewed the contents of the initial notification requirements under 40 CFR 63.9(b) and determined that the content for MSDL notifications should be virtually identical to other notifications but to provide clarity it warrants a required indication that the facility is submitting the notification because it is an MSDL facility.

To provide this clarity, the EPA is proposing that MSDL facilities include in their notification a statement that the facility is a major source due to HAP listing (MSDL) if the sole reason that the facility became major and triggered NESHAP applicability is the addition of a new HAP to 40 CFR subpart C, § 63.64. A red-lined copy of the General Provisions, including the proposed notification amendments for MSDL facilities is included in the docket for review. See OAR-HQ-OAR-2022-0441.

The EPA also considered whether additional information should be required from other facilities that emit

a newly listed HAP but are already subject to major source NESHAP requirements and are not required to submit either of the above documents when a new HAP is listed. Additional information on HAP usage, HAP emissions, potential controls, and other inventory information could aid in the EPA's development of the best strategy for regulating a new HAP. However, this benefit needs to be weighed against the potential burden for developing and submitting this information from facilities that emit the newly listed HAP, especially as the facilities could include small businesses. The EPA solicits comments on whether additional notifications should be required for facilities that emit a newly listed HAP but are not triggered to submit an initial notification upon the listing. For example, this proposal solicits comment on whether a notification should be required from any facility that emits the newly listed HAP over some *de minimis* level. The EPA also asks whether additional public notification requirements should be included to provide better communication of public health risks by facilities that emit a newly listed HAP or if other mechanisms already exist, or will exist, to serve this function. If notice is required, we request comment on how best to establish a *de minimis* level, if one is recommended, and the basis for the proposed level.

III. Solicitation of Additional Comments

In addition to soliciting comments on the topics discussed earlier in this document, including the applicability of existing source MACT requirements for MSDLs and the compliance time allowed for MSDLs, the EPA additionally requests comments and information on the following questions.

A. Regulatory Changes

The EPA has developed a redline-strikeout version of sections of 40 CFR part 63, subparts A and C, that would be revised under the proposed changes listed in this document. The draft regulatory language for the recommended options is included for review in the docket for this rule. See EPA Docket EPA-HQ-OAR-2022-0441. The EPA is requesting comments on this language.

B. Early Input on Future EPA Action to Integrate Newly Listed HAP Into the CAA Section 112 Program

While the focus of this proposed rulemaking is on the immediate impacts to MSDL facilities, the EPA acknowledges that there are other steps

that must be taken to fully address a newly listed HAP under CAA section 112 regulatory framework. Foremost among these steps is the regulation and the resulting reduction in emissions of a newly listed HAP. However, as discussed above, existing NESHAP do not regulate the newly listed HAP unless and until the NESHAP is revised and an emission standard is established following the requirements of CAA section 112(d).

This proposed rulemaking addresses only one part of the overall program to incorporate a new HAP into CAA section 112 regulatory framework. Future steps that are not addressed in this rulemaking would likely include addressing issues such as how best to develop an accurate emissions inventory for the new HAP, identify the sources that emit the new HAP, and either revising existing NESHAP standards or establishing new standards, as necessary, to incorporate and thereby reduce the emissions of the new HAP.

The EPA is seeking comments on how best to obtain information about which sources and source categories emit a newly listed HAP, how much these facilities emit, how best to inform the populations surrounding these facilities that the facilities that emit a newly listed HAP, and how to incorporate meaningful engagement with affected communities in future actions.

The EPA seeks comment on how to best provide outreach to entities that could be subject to requirements as an MSD facility because of an addition to the HAP list.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866, as amended by Executive Order 14094. Any changes made in response to reviewer recommendations have been documented in the docket.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA.

C. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. Specifically, this action proposes a regulatory requirement addressing requirements for when a new HAP is added to the CAA section 112 HAP list; any burden from the addition of a new HAP is rightfully considered under the individual NESHAP that is triggered and not under the actions in this document.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. This action does not impose any requirements on facilities or other parties.

This action proposes amendments to General Provisions that provide requirements for when a new HAP is added to the CAA section 112 HAP list.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It would not impose substantial direct compliance costs on tribal governments that have designated facilities located in their area of Indian country. This action also will not have substantial direct costs or impacts on the relationship between the Federal government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern

environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it will not have a significant adverse effect on the supply, distribution or use of energy. Specifically, this action proposes amendments to General Provisions to provide requirements for when a new HAP is added to the CAA section 112 HAP list.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

Executive Order 12898 establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the U.S. This rule would not increase the level of environmental protection for all affected populations, and it also will not have any disproportionately high and adverse health or environmental effects on any population, including any minority, or low-income population. Specifically, this action proposes amendments to NESHAP General Provisions to provide requirements for when a new HAP is added to the CAA section 112 HAP list. These proposed changes would aid in the implementation of updated and new

NESHAP that will occur after a new HAP has been listed.

Michael S. Regan,
Administrator.

[FR Doc. 2023-19674 Filed 9-12-23; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R2-ES-2023-0073;
FF09E21000 FXES1111090FEDR 234]

RIN 1018-BG35

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Quitobaquito Tryonia and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the Quitobaquito tryonia (*Tryonia quitobaquiae*), a springsnail species from Arizona, as an endangered species under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the Quitobaquito tryonia. After a review of the best available scientific and commercial information, we find that listing the species is warranted. We also propose to designate critical habitat for the Quitobaquito tryonia under the Act. In total, approximately 6,095 square feet (566 square meters) across 2 subunits in Pima County, Arizona, fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for Quitobaquito tryonia. If we finalize this rule as proposed, it would extend the Act's protections to this species and its designated critical habitat.

DATES: We will accept comments received or postmarked on or before November 13, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by October 30, 2023.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: [https://](https://www.regulations.gov)

www.regulations.gov. In the Search box, enter FWS-R2-ES-2023-0073, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R2-ES-2023-0073, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: Supporting materials, such as the species status assessment report, are available on the Service's website at <https://www.fws.gov/office/arizona-ecological-services>, at <https://www.regulations.gov> at Docket No. FWS-R2-ES-2023-0073, or both. For the proposed critical habitat designation, the coordinates or plot points or both from which the map is generated are included in the decision file for this critical habitat designation and are available at <https://www.regulations.gov> at Docket No. FWS-R2-ES-2023-0073 and on the Service's website at <https://www.fws.gov/office/arizona-ecological-services>.

FOR FURTHER INFORMATION CONTACT:

Heather Whitlaw, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 9828 North 31st Ave #C3, Phoenix, AZ 85051-2517; telephone 602-242-0210. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely

to become an endangered species within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the Quitobaquito tryonia meets the definition of an endangered species; therefore, we are proposing to list it as such and proposing a designation of its critical habitat. Both listing a species as an endangered or threatened species and making a critical habitat determination can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to list the Quitobaquito tryonia as an endangered species under the Act, and we propose the designation of critical habitat for the species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that Quitobaquito tryonia is endangered due to the following threats: decline in spring flow resulting from groundwater pumping and ongoing drought; effects of climate change; and spring modification.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, to designate critical habitat concurrent with listing. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any

other relevant impacts of specifying any particular area as critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

- (1) The species' biology, range, and population trends, including:
 - (a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;
 - (b) Genetics and taxonomy;
 - (c) Historical and current range, including distribution patterns and the locations of any additional populations of this species;
 - (d) Historical and current population levels, and current and projected trends; and
 - (e) Past and ongoing conservation measures for the species, its habitat, or both.
- (2) Threats and conservation actions affecting the species, including:
 - (a) Factors that may be affecting the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors;
 - (b) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species; and
 - (c) Existing regulations or conservation actions that may be addressing threats to this species.
- (3) Additional information concerning the historical and current status of this species.
- (4) Specific information on:
 - (a) The amount and distribution of Quitobaquito tryonia habitat;
 - (b) Any additional areas occurring within the range of the species that should be included in the designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species;
 - (c) Special management considerations or protection that may be

needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) Whether occupied areas are adequate for the conservation of the species, as this will help us evaluate the potential to include areas not occupied at the time of listing. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as habitat for the species.

(5) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(6) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(7) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(8) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act (16 U.S.C. 1531 *et seq.*), and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. If you think we should exclude any areas, please provide information supporting a benefit of exclusion.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the

basis of the best scientific and commercial data available, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <https://www.regulations.gov>.

Our final determination may differ from this proposal because we will consider all comments we receive during the comment period as well as any information that may become available after this proposal. Based on the new information we receive (and, if relevant, any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species. In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain

reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On June 25, 2007, we received a petition dated June 18, 2007, from Forest Guardians (now WildEarth Guardians) to list 475 species, including the Quitobaquito tryonia, in the southwestern United States as endangered or threatened species and to designate critical habitat under the Act. On December 16, 2009, we published a partial 90-day finding (74 FR 66866) on 192 species from that petition; in that document, we announced that the petition presented substantial information that the Quitobaquito tryonia may be warranted for listing.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the Quitobaquito tryonia. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the Quitobaquito tryonia SSA report. We sent the SSA report to four independent peer reviewers and received two responses. We also sent the SSA report to six partner reviewers and received three responses. Results of this structured peer review process can be found at <https://www.regulations.gov>. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed in Peer Review above, we received comments from two peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive

issues and new information regarding the information contained in the SSA report. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions that we incorporated into an updated version of the SSA report. One reviewer requested that we analyze water quality quantitatively in the report. We clarified that although some water quality parameters have been recorded in the springs that the Quitobaquito tryonia inhabits, we do not know the full suite of parameters, nor the thresholds to which the species is sensitive. Otherwise, no substantive changes to our analysis and conclusions within the SSA report were deemed necessary, and peer reviewer comments are addressed in version 1.1 of the SSA report (Service 2022, entire).

I. Proposed Listing Determination

Background

The Quitobaquito tryonia is a small freshwater snail with a conical shell that measures 0.05 to 0.08 inches (in) (1.4 to 2.1 millimeters (mm)) in length. The shell has 3.5 to 4.5 highly convex whorls with deep sutures (or indentations where whorls meet) and is typically clear, gray, or black in color. Quitobaquito tryonia is dioecious (Hershler 2001, pp. 3–5), meaning male and female organs occur in separate individuals. The lifespan of springsnails is thought to be annual (Lysne et al. 2007, p. 649; Brown et al. 2008, p. 487), with estimates of longevity ranging from 9 to 15 months (Pennak 1989, p. 552).

Quitobaquito tryonia is likely an herbivore or detritivore that primarily grazes on periphyton (a mixture of algae, bacteria, detritus, fungi, diatoms, and protozoa that grow on exposed surfaces (Lysne et al. 2007, p. 649)) and aquatic plants (Pyron and Brown 2015, pp. 386, 401). The species can more easily consume periphyton, which is also more nutrient-rich than aquatic plants; however, if periphyton availability is limited or depleted, Quitobaquito tryonia will consume aquatic plants (Pyron and Brown 2015, p. 399).

Historically, Quitobaquito tryonia is known from three proximal springs or spring complexes, Quitobaquito Springs, Williams Spring, and Burro Spring, that lie near the international border of the United States (Arizona) and Mexico; these springs/spring complexes are in the southwestern corner of Organ Pipe Cactus National Monument, which is managed by the National Park Service (NPS), in Pima County, Arizona (Hershler and Landye

1988, p. 50). Quitobaquito tryonia was first collected in 1963, from Quitobaquito Springs (Hershler and Landye 1988, p. 50; Rosen et al. 2010, p. 8). The species has been extirpated from Williams and Burro Springs but remains extant at Quitobaquito Springs. The species is found in the 200-meter (m) (700-foot (ft)) spring channel of Quitobaquito Springs, which is a human-made, concrete-lined channel with riffle, run, and pool habitat types that was built as part of a restoration project in 1989. The channel is fed by two springs, the Northeast and Southwest springs. The NPS regularly manages vegetation along the stream channel to reduce submerged and emergent vegetation, creating a mosaic of available habitats and ensuring water can flow freely through the channel.

The Quitobaquito tryonia was recently detected at a fourth location in October 2020, a seep (Hillside Seep #2) located approximately 100 m (328 ft) southeast of the main channel at Quitobaquito Springs. Hillside Seep #2 is located to the southeast and slightly upslope from the Southwest Spring at Quitobaquito. The seep is not hydrologically connected overland to the concrete-lined spring channel at Quitobaquito Springs and, for the purposes of this analysis, is being considered a separate population. While there are no surface water connections between the seep and spring channel, it is likely that they have the same groundwater source based on proximity and local geology. Quitobaquito tryonia is the only species in the Cochliopidae family of small freshwater snails that occurs in the spring complex. There are six additional seeps (including Hillside Seep #1) that have been surveyed in the area near Quitobaquito Springs that have low flow and possible springsnail habitat, but no Quitobaquito tryonia were found (Sorensen 2021, p. 10). The presence of dense vegetation precluded searching all possible habitat, so it is possible that Quitobaquito tryonia individuals are present in the inaccessible portions of these seeps. Based on the hydrology and geology of the area, additional undocumented seeps may exist in the area of Quitobaquito Springs that have not been investigated for presence of Quitobaquito tryonia.

Tohono O'odham and Hia Ced O'odham farmers inhabited the area including the Quitobaquito Springs complex for several centuries prior to the arrival of Europeans in the 1600s, and the spring water was used for irrigation (Bennett and Kunzmann 1989, p. 1; Nabhan et al. 1982, pp. 124–126). Large-scale water management of the

springs likely began in 1863, when Euro-American settlers excavated Quitobaquito Pond and built a dam to hold water diverted from the two main spring sources (Bennett and Kunzmann 1989, p. 15; Pearson and Conner 2000, p. 392). Irrigation ditches were constructed from the pond for agricultural fields to the south and west. In 1915–1919, grazing pressure intensified with the establishment of a large cattle operation and ranch that encompassed all of present-day Organ Pipe Cactus National Monument (Bennett and Kunzmann 1989, pp. 21–22).

The Quitobaquito tryonia requires perennial spring flow, adequate water quality, and substrates or aquatic vegetation of sufficient type and quantity. Brooded young, juveniles, and adults all need adequate spring flow and water quality to meet their resource functions, which include feeding, growth, survival, and breeding (Hershler 1984, p. 68; Hershler and Sada 2002, p. 256; Martinez and Thome 2006, p. 14). Specifically, spring flow must be perennial to prevent desiccation (drying out) of individuals and to maintain stable water quality parameters. The Quitobaquito tryonia also needs suitable substrate and aquatic vegetation for shelter and periphyton growth. While *Tryonia* spp. are found on a variety of substrate types, there is some evidence that coarse substrates may promote higher abundances of Quitobaquito tryonia (Bogan 2018, entire; Williams and Sorensen 2019, p. 2).

For a thorough review of the taxonomy, life history, and ecology of the Quitobaquito tryonia, please refer to the SSA report (Service 2022, pp. 4–7).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26,

2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an "endangered species" as a species that is in danger of extinction throughout all or a significant portion of its range, and a "threatened species" as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term "threat" to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term "threat" includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term "threat" may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an "endangered species" or a "threatened species." In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then

analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an "endangered species" or a "threatened species" only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term "foreseeable future," which appears in the statutory definition of "threatened species." Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term "foreseeable future" extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess Quitobaquito tryonia viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R2–ES–2023–0073 on <https://www.regulations.gov> and at <https://www.fws.gov/office/arizona-ecological-services>.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. For the Quitobaquito tryonia to maintain viability, its populations must be highly resilient with sufficient redundancy and representation. Several factors influence the resiliency of the

Quitobaquito tryonia populations, including: (1) the reduction of spring discharge, (2) effects of climate change, (3) spring modification, and (4) conservation actions. These resiliency factors and habitat elements are discussed in detail in the SSA report (Service 2022, entire) and are summarized here.

Species Needs

Spring Flow

Spring flow in spring systems is maintained by groundwater, and individual springs may range widely in size, water chemistry, morphology, landscape setting, and persistence (Springer and Stevens 2009, p. 84). Groundwater recharge of aquifers occurs through precipitation, through surface water from rivers, or as an anthropogenic input from irrigation and municipal returns (Trček and Zojer 2010, p. 87). A decline in groundwater recharge or increase in groundwater discharge (e.g., from groundwater withdrawal, drought, or increased evapotranspiration) can lead to reductions, disruptions, or cessation of spring flow. While the Quitobaquito tryonia possesses an operculum (Johnson et al. 2013, p. 248), which enables the shell to be sealed, this only provides protection from drying for a very limited period of time (*i.e.*, hours to days).

Water Quality

While the full suite of water quality conditions that the Quitobaquito tryonia prefers has not been determined, water quality measurements have been recorded for some parameters in springs inhabited by the Quitobaquito tryonia or other closely related species. The water chemistry of a spring is strongly influenced by aquifer geology. Several habitat variables, such as dissolved oxygen, pH, conductivity, and temperature, may influence the distribution and abundance of springsnails (O'Brien and Blinn 1999, pp. 231–232; Mladenka and Minshall 2001, pp. 209–211; Malcom et al. 2005, p. 75; Martinez and Thome 2006, pp. 12–15; Lysne et al. 2007, p. 650). No known sources of contaminants are present in the Quitobaquito Springs system, although some concern has been raised regarding the aerial application of agricultural pesticides in the Rio Sonoyta watershed of Mexico and the threat of wind drift (NPS 2006a, p. 1). However, a contaminant study from the early 1990s found no evidence of contamination from sediment samples taken from Quitobaquito Pond (King et al. 1996, pp. 3–5).

Substrate and Vegetation

While *Tryonia* spp. are found on a variety of substrate types, there is some evidence that coarse substrates may promote higher abundances of Quitobaquito tryonia. Bogan (2018, entire) noted differences in densities of Quitobaquito tryonia within the 200-m (700-ft) spring channel at Quitobaquito Springs. The spring channel at Quitobaquito Springs is a concrete-lined channel with riffle, run, and pool habitat types. The NPS regularly manages vegetation along the stream channel to reduce submerged and emergent vegetation, creating a mosaic of available habitats and ensuring water can flow freely through the channel. Within the channel, Quitobaquito tryonia were densest in gravel riffles, followed by concrete runs and riffles, then vegetated pools. However, surveys by Arizona Game and Fish Department (AZGFD) biologists at Quitobaquito Springs have not found any Quitobaquito tryonia along the densely vegetated margins of the pond, located at the terminus of the spring channel (Williams and Sorensen 2019, p. 2).

Organ Pipe Cactus National Monument was established in 1937, but cattle operations near Quitobaquito, Williams, and Burro Springs continued until large-scale cattle operations ended in 1976 (Warren and Anderson 1987, p. 1). In 1978, the remaining cattle were removed from the Monument (Bennett and Kunzmann 1989, pp. 15, 21–22). After the large-scale cattle operations ended, spring sources became dense with vegetation and standing water was reduced (Warren and Anderson 1987, p. 13). These effects of intensive livestock grazing on vegetation change and soil disturbance ended in 1978–79 across the Springs at Organ Pipe Cactus National Monument. Occasionally, trespass cattle and other livestock (*i.e.*, horses and burros) still occur within the greater Organ Pipe Cactus National Monument, but they are not common near Quitobaquito Springs. The concrete channel that was installed in 1989 (NPS 1992, pp. 28–30) also created a more stable system within the Springs, so the Quitobaquito tryonia population experiences less of an effect of vegetation change, soil disturbance, and reductions/fluctuations in preferred substrates.

Risk Factors for the Quitobaquito Tryonia

We reviewed the potential risk factors (*i.e.*, threats, stressors) that could be currently affecting the Quitobaquito tryonia. In this proposed rule, we will discuss only those factors in detail that

could meaningfully impact the status of the species. Those risk factors that are unlikely to have significant effects on the Quitobaquito tryonia, such as vegetation and soil disturbance, invasive species, and predation, are not discussed here but are evaluated in the SSA report. For example, the introduction of nonnative or invasive predators has the potential to negatively affect the Quitobaquito tryonia (Hershler 1998, p. 14; Sada 2017, p. 11). However, nonnative predators such as bullfrogs, crayfish, and cichlids are not currently present in areas occupied by the Quitobaquito tryonia. Quitobaquito Springs is a remote, isolated natural water, and is neither a destination for anglers (e.g., bait bucket dump), nor is stocked with fish from State or Federal hatcheries. The primary risk factors (*i.e.*, threats) affecting the status of the Quitobaquito tryonia are the reduction of spring discharge (Factor A), effects of climate change (Factor E), and spring modification (Factor A).

Reduction of Spring Discharge

Quitobaquito Springs complex is likely supplied by prehistoric water (*i.e.*, water that was deposited many millennia before current day) stored beneath an area centered around Aguajita Wash with the Quitobaquito Hills roughly delineating the western boundary, shallow bedrock to the east, and Rio Sonoyta to the south (Carruth 1996, pp. 18, 20; see figure 4.2 in the SSA report for a map of the area). Groundwater recharge in the approximately 100-square-mile area is primarily from the limited infiltration (5–10 percent) of local rainfall (6.6 inches/year; Carruth 1996, p. 18). The historically consistent spring flows at Quitobaquito Springs were highly dependent on large, stored water volumes (Carruth 1996, p. 21). However, long-term spring flow has declined over the last 25 years (see figure 1, below; Zamora 2018, p. 146; Zamora et al. 2020, pp. 5–6). Although it is uncertain how impacts to the regional aquifer may affect Quitobaquito Springs complex outputs (Carruth 1996, p. 21; Zamora et

al. 2020, p. 15), stressors on the Rio Sonoyta aquifer may include municipal water usage for the city of Sonoyta (Sonora, Mexico); local agriculture (*i.e.*, irrigated crop fields and cattle ranching); and water usage associated with local construction of the U.S.–Mexico border wall.

The City of Sonoyta has grown in human population since the late 1960s (Brown 1991, p. 6). By 1988, there were 212 wells (165 for irrigation) pumping in or near the city of Sonoyta (Brown 1991, p. 18). Even with the Mexican government placing a moratorium on any new wells being dug in 1988, groundwater withdrawals are exceeding recharge to the aquifer (Brown 1991, p. 47). Under conditions in the early 1990s, annual pumping capacity was approximately 2.5 times greater than the annual rate of recharge (Brown 1991, p. 27), and the number of irrigated acres has remained constant since 1982 (Brown 1991, p. 47). Census data from 1995 to present day show a peak population for Sonoyta and the surrounding area in 2010 with steady declines since. While the existing pumping infrastructure is capable of greatly exceeding the recharge rate in the Rio Sonoyta basin, during a study from 2001 to 2006, it was observed that many of the irrigation wells, pumps, and ditches were not in use (Rosen et al. 2010, p. 13).

Additionally, beginning in 2020, there has been water withdrawal associated with border wall construction between the United States and Mexico; this water withdrawal affected the groundwater and aquifer systems supplying Quitobaquito Springs. A permit filed by U.S. Customs and Border Protection requested 84,000 gallons per day for a 45-day build period. Two new wells were drilled to meet the water demand, which may hasten the “drawdown” of water resources in an area where groundwater withdrawals from the nearby Rio Sonoyta alluvial aquifer exceed the recharge rate (Brown 1991, p. 27). These new wells were located 11 to 13 kilometers (7 to 8 miles) from

Quitobaquito Springs to minimize any potential stress on spring output (Morawe 2021, pers. comm.). Future border wall construction has been paused, but construction, and thus water withdrawal, may resume in the future.

Drought has the potential to impact spring flow by reducing the amount of recharge into the groundwater system and increasing evaporation of surface water due to extended periods of high ambient temperatures. Statewide trends in Arizona over the last 100 years show 60 percent of the last 20 years were in drought conditions (NOAA 2021, unpaginated). Pima County, Arizona, has been in an extended drought since 2000, which coincides with continued declines in spring flow output at Quitobaquito Springs. Along with drought, a trend of warmer and drier conditions in Organ Pipe Cactus National Monument has been observed (NPS 2014, entire). Climate change is expected to further exacerbate drought conditions.

As a result of groundwater withdrawals and drought, spring discharge has declined at Quitobaquito, Williams, and Burro Springs. Monitoring of spring discharge at Quitobaquito Springs began in 1973 and has continued intermittently through the present day. Methods for measuring discharge varied over the years, but long-term spring flow measurements show a decline in discharge over the last 25 years (see figure 1, below; Zamora 2018, p. 146; Zamora et al. 2020, pp. 5–6). By the early 2000s, Williams and Burro Springs had ceased flowing completely (NPS 2006b, p. 9), and the species is now considered extirpated from these areas, though there is some evidence of seasonally intermittent surface water occurring at Williams Spring (Williams and Sorensen 2019, p. 3). Burro Spring became intermittent sometime prior to 1992 (NPS 1992, p. 28), while Williams Spring still maintained perennial discharge during the summer of 1991 (Goodman 1992, p. 143).

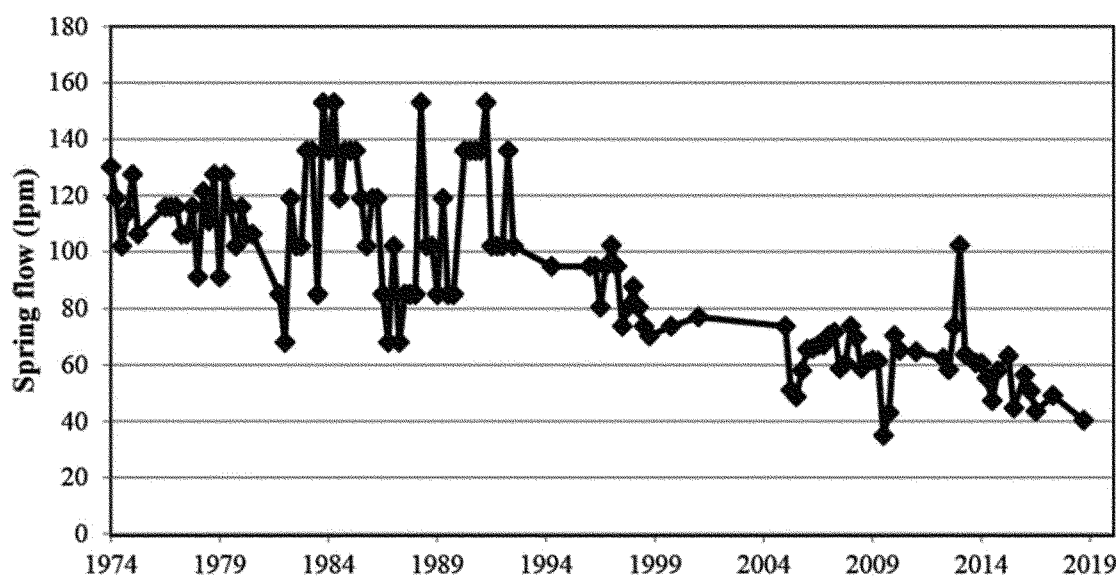


Figure 1. Discharge in liters per minute (lpm) at Quitobaquito Springs from 1973 to 2017 (from Zamora 2018, p. 146).

Effects of Climate Change

There is a broad consensus among climate models that arid ecosystems are especially vulnerable to the impacts of climate change (Seager et al. 2007, pp. 1181–1184; Weiss and Overpeck 2005, p. 2075; Archer and Predick 2008, p. 24). The current prognosis of climate change impacts on the Sonoran Desert includes fewer frost days; warmer temperatures; greater water demand by plants, animals, and people; and an increased frequency of extreme weather events (such as heat waves, droughts, and floods) (Weiss and Overpeck 2005, p. 2074; Archer and Predick 2008, p. 24). For the southwestern United States, the following influences of climate change are projected: (1) Continued warming with longer and hotter heat waves in summer; (2) decreased average precipitation in the southern portion; (3) more frequent and intense extreme precipitation in winter; (4) decreased late-season snowpack; (5) decreased river flow and soil moisture; (6) more frequent and intense flooding in some seasons and some parts of the Southwest, and less frequent and intense in other seasons; and (7) hotter, more severe, and more frequent droughts in parts of the Southwest (Garfin et al. 2013, pp. 5–6).

Reductions in annual rainfall associated with climate change, coupled with hotter temperatures that are projected with very high confidence, will likely bring reductions in aquifer inputs due to reduced recharge and higher evaporation rates, and will likely

have negative effects on aquifers across the Southwest. Virtually every plausible future climate scenario projects longer dry spells between rains, which can have more severe impacts on the landscape, especially in spring and summer (Lenart 2007, entire). It is therefore possible that some existing Quitobaquito tryonia habitat will periodically dry up in the spring and summer during the current century. Bigger and more frequent floods caused by more intense, heavy rainfall events are also expected episodically in the winter (Overpeck et al. 2013, p. 6) and may be even more destructive as riparian vegetation declines within the greater system, although flooding may not have as pronounced of an effect on the concrete-lined channel of Quitobaquito Springs. Climate change trends are highly likely to continue (Overpeck et al. 2013, entire). Climatic impacts on the Quitobaquito tryonia will likely be further complicated by interactions with other factors (e.g., interactions with nonnative species and other habitat-disturbing activities).

Spring Modification

Spring modifications include channel modification, surface water diversions, and impoundment at springs. Spring modifications may occur for development, management, or restoration purposes and have been extensively documented at Quitobaquito Springs, although some modification also occurred at Williams Spring. These modifications may be either beneficial

or detrimental to springsnail populations depending on the context. Human alterations of springheads to concentrate or divert discharge negatively affect spring systems and have resulted in the decline or loss of springsnail populations throughout the southwestern United States and northern Mexico (Unmack and Minckley 2008, p. 20; Hershler et al. 2011, p. 12; Hershler et al. 2014, pp. 51, 53, 56, 58–63). Surface water diversions are sources of multiple stresses to springs, including altering physical integrity, creating conditions that favor nonnative aquatic species, and degrading habitat conditions for native riparian vegetation (Sada 2017, pp. 10–11). Additionally, the presence of pipes, dikes, dams, impoundments, channel modifications and dredging, or spring boxes indicate further stress in the form of spring diversions and loss of occupancy of springsnails at some sites. Although surface water diversions can cause stress to springs and springsnails, populations of springsnails in historically disturbed habitats can recover if the disturbance is low in magnitude and infrequent (Sada 2017, p. 22).

While restoration may be a temporary source of stress to a spring system and springsnails, there is often an overall benefit to springsnails by improving all of the species' needs within a spring (e.g., water quality, substrate and vegetation, and spring flow). Aquatic habitat at Quitobaquito Springs was severely reduced in the 1970s when

flow from the Southwest Spring was directed into an underground pipe. However, a restoration project in 1989 restored aboveground flow through channel modification and the creation of a concrete-lined stream that mimics riffle, run, and pool habitats; that stream is currently inhabited by the Quitobaquito tryonia.

Summary

Several historical and ongoing influences, including reductions in spring discharge, effects of climate change, and spring modification, may affect the viability of the Quitobaquito tryonia. The most pervasive threat to the species is the historical and ongoing loss or decline in spring discharge. Quitobaquito tryonia populations in two springs (Burro and Williams) are now extirpated because of a loss of perennial flow, while Quitobaquito Springs has

seen a documented decline in discharge. The causes of the decline in spring discharge are not definitive but are likely related to ongoing drought conditions and groundwater pumping. Climate change is expected to exacerbate these conditions. Spring modification has had both positive and negative influences on the viability of the Quitobaquito tryonia. Historical anthropogenic modification of Quitobaquito Springs severely curtailed available habitat, while ongoing conservation efforts have restored spring channel habitat.

Species Condition

The current condition of the Quitobaquito tryonia considers the risks to the populations that are currently occurring. In the SSA report, for each population, we developed and assigned condition categories for one

demographic factor and three habitat factors that are important for the viability of the Quitobaquito tryonia. We used abundance to measure demographics of the populations, and we characterized habitat using spring flow, water quality, and substrate and vegetation as our metrics. The condition scores for each factor were then used to determine an overall condition of each population: high, moderate, low, or extirpated.

The Quitobaquito Springs population is in high condition for all metrics, with an overall high population resiliency. Hillside Seep #2 is in low condition for abundance, moderate condition for spring flow and substrate and vegetation, and high condition for water quality, for an overall moderate population resiliency (see table 1, below). Williams Spring and Burro Spring are extirpated.

TABLE 1—CURRENT CONDITION OF THE QUITOBAQUITO TRYONIA

Population	Demographic metric	Habitat metric			Current population resiliency
	Abundance	Spring flow	Water quality	Substrate and vegetation	
Quitobaquito Springs ..	High	High	High	High	High.
Hillside Seep #2	Low	Moderate	High	Moderate	Moderate.
Williams Spring	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.
Burro Spring	Extirpated	Extirpated	Extirpated	Extirpated	Extirpated.

Repopulation of extirpated locations (Williams Spring and Burro Spring) is unlikely because although the springs may be intermittent, perennial surface water is absent, making habitat unsuitable for the Quitobaquito tryonia (Williams and Sorensen 2019, p. 3). The exact date when the Quitobaquito tryonia became extirpated from these locations is unknown, but habitat was deemed unsuitable for springsnails in 2004, and no Quitobaquito tryonia were found at this time or during subsequent visits (Martinez and Sorensen 2016, p. 4; Williams and Sorensen 2019, p. 3).

Redundancy for the Quitobaquito tryonia is characterized by having multiple, sufficiently resilient populations distributed across the spring systems historically occupied by the species for the species to be able to withstand catastrophic events. Species that are well-distributed across their historical range are less susceptible to the risk of extirpation (Carroll et al. 2010, entire; Redford et al. 2011, entire). Currently, because there are two extant populations with moderate or high resiliency and two extirpated populations, redundancy of the species has been reduced from historical levels. Additionally, the Quitobaquito tryonia

has always been a highly localized endemic (it historically occupied springs occurring within a 1-kilometer (0.6-mile) radius of one another); the two extant populations are separated by roughly only 100 m (328 ft). Thus, a catastrophic event (such as drought) is highly likely to simultaneously affect both remaining populations of the Quitobaquito tryonia. Conversely, despite their proximity, the populations are isolated and not connected by overland flow; thus, some catastrophic events, such as the introduction of an invasive species, may only affect one of the two populations. However, this isolation would also limit the ability of the Quitobaquito tryonia to naturally recolonize given its limited dispersal ability. Because of the species' small size and dependence on water, dispersal events are rare and opportunistic, with overland transportation likely occurring by "hitchhiking" on birds or other animals (Hershler et al. 2005, pp. 1755–1756, 1763). Therefore, species redundancy for the Quitobaquito tryonia is currently limited to two populations that occur within a reduced geographical extent, which reduces the species' ability to withstand catastrophic events.

Representation reflects a species' capacity to adapt to changing environmental conditions over time and can be characterized by genetic and ecological diversity within and among populations. We describe species representation in terms of habitat variability across its historical range because data on the species' life history, demographics, and population genetics are lacking. Quitobaquito Springs has the greatest discharge of the four springs. It is possible that some local adaptation to water temperature, flow velocity, and/or community interactions occurred among the populations. Gene flow between populations is unlikely due to the isolation of separate springs and the species' limited dispersal ability. Because the species is limited in range and dispersal abilities and the spring habitats of its populations share several characteristics, the adaptive capacity, and thus the species' representation, is limited.

As part of the SSA, we also developed two future condition scenarios at two time steps (10 years and 40 years into the future) to capture the range of uncertainties regarding future threats and the projected responses by the Quitobaquito tryonia. Our scenarios

assumed a continued rate changing climate conditions, water withdrawals, or drought that may impact groundwater levels and the rate of spring flow decline, as well as those factors at increased levels. Because we determined that the current condition of the Quitobaquito tryonia is consistent with an endangered species (see *Determination of Status*, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2022) for the full analysis of future scenarios.

We note that, by using the SSA framework (Service 2016) to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Conservation Efforts and Regulatory Mechanisms

Several habitat management actions can benefit the viability of the Quitobaquito tryonia by reducing or removing threats to the species. The concrete channel that was installed in 1989 (NPS 1992, pp. 28–30) created a more stable system within the spring population that is less affected by vegetation change, soil disturbance, and reductions/fluctuations in preferred substrates. The concrete channel prevents establishment of dense vegetative stands that may impede flow, which is required to maintain species viability. Additionally, staff at Organ Pipe Cactus National Monument regularly remove dense aquatic vegetation from the spring channel to maintain stream flow and provide a mosaic of habitat types throughout the spring channel (Raymond et al. 2019, pp. 18–19; Martin 2023a, pers comm.). Quitobaquito tryonia are less abundant in pool habitat and on aquatic vegetation compared to run or riffle habitat and on other substrates (Bogan 2018, entire; Williams and Sorensen 2019, p. 11; Sorensen 2021, pp. 5–8, 12). Aquatic vegetation removal may result in the loss of some Quitobaquito tryonia individuals, but this action is necessary to maintain flow of the spring channel.

Determination of Quitobaquito Tryonia's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an “endangered species” as a species in danger of extinction throughout all or a significant portion of its range, and a “threatened species” as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that although the Quitobaquito tryonia has sufficiently resilient extant populations, it has declined in number of populations from known historical levels. Our analysis revealed several factors that caused this decline and pose a meaningful risk to the viability of the species. These threats are primarily related to habitat changes (Factor A) and include the reduction of spring discharge and spring modification, in addition to effects of climate change (Factor E).

The Quitobaquito tryonia is known from four historical populations, but two of those have become extirpated (Williams Spring and Burro Spring). As a narrow endemic species, it historically occupied springs occurring within a 1-kilometer (0.6-mile) radius. Because the Williams Spring and Burro Spring populations are extirpated, current redundancy of the species has been reduced 50 percent from historical levels. The Quitobaquito tryonia has always been a highly localized endemic, and the two extant populations (Quitobaquito Springs and Hillside Seep #2) are only separated by roughly 100 m (328 ft). Therefore, a catastrophic event, such as drought, is highly likely to simultaneously affect both remaining populations of the Quitobaquito tryonia.

The most pervasive threat to the species is the historical and ongoing loss or decline in spring discharge. The species' populations at two springs (Burro Spring and Williams Spring) are extirpated because of a loss of perennial flow, while the Quitobaquito Springs complex has seen a documented decline in discharge. From January 2020 to October 2021, daily mean discharge ranged from 26 to 51 lpm and averaged 35 lpm, which is a decrease from recorded levels from 1981 to 1992 of 57 to 151 lpm and averaged 106 lpm (Carruth 1996, p. 15). Although discharge at Hillside Seep #2 has not been measured, it is a less wetted area and has even lower flow velocity than Quitobaquito Springs (AZGFD 2021, p. 3). The causes of the decline in spring discharge are likely related to ongoing drought conditions and groundwater pumping. Climate change is expected to exacerbate these conditions with increased temperatures, and more severe and frequent droughts. Historical modification of the spring complex has severely curtailed available habitat, and the loss of spring flow is ongoing and expected to continue (see figure 1, above).

Despite their proximity, the populations are isolated and not connected by overland flow, and this isolation also limits the ability of the Quitobaquito tryonia to naturally recolonize given the species' lack of dispersal ability. Because of the species' small size and dependence on water, dispersal events are rare and opportunistic, with overland transportation likely occurring by “hitchhiking” on birds or other animals (Hershler et al. 2005, pp. 1755–1756, 1763). Therefore, gene flow between the populations is limited or nonexistent.

In summary, the Quitobaquito tryonia is more susceptible to extirpation from catastrophic events and has reduced adaptive capacity. The number of known populations has already been reduced by 50 percent because of loss of spring flow, which is continuing to occur and is impacting the remaining two populations. The species is currently in danger of extinction because reduction of spring discharge, spring modification, and the effects of climate change are all risks that have historically impacted, and are currently impacting, the species and are reducing its viability across its range. We do not find the species meets the definition of a threatened species because the species has already shown declines in the number and resiliency of populations. Two of the four known populations have already become extirpated due to the threats mentioned above. Although

one population is currently in high condition and the other population is currently in moderate condition, both are currently experiencing impacts from the aforementioned threats. Because current redundancy is reduced from known historical levels, and representation is limited due to the close proximity of the two remaining populations, the species is vulnerable to catastrophic and stochastic events. Thus, after assessing the best available information, we determine that the Quitobaquito tryonia is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the Quitobaquito tryonia is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the Quitobaquito tryonia warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity v. Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020), which vacated the provision of the Final Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species” (79 FR 37578; July 1, 2014) providing that if the Service determines that a species is threatened throughout all of its range, the Service will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the Quitobaquito tryonia meets the Act’s definition of an endangered species. Therefore, we propose to list the Quitobaquito tryonia as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public

awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species’ decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (“downlisting”) or removal from protected status (“delisting”), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (<https://www.fws.gov/program/endangered-species>), or from our Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a

broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Arizona would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Quitobaquito tryonia. Information on our grant programs that are available to aid species recovery can be found at: <https://www.fws.gov/service/financial-assistance>.

Although the Quitobaquito tryonia is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7 of the Act is titled “Interagency Cooperation” and mandates all Federal action agencies to use their existing authorities to further the conservation purposes of the Act and to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. Regulations implementing section 7 are codified at 50 CFR part 402.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal

consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

In contrast, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that *is likely* to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Although the conference procedures are required only when an action is likely to result in jeopardy or adverse modification, action agencies may voluntarily confer with the Service on actions that may affect species proposed for listing or critical habitat proposed to be designated. In the event that the subject species is listed or the relevant critical habitat is designated, a conference opinion may be adopted as a biological opinion and serve as compliance with section 7(a)(2) of the Act.

Examples of discretionary actions for the Quitobaquito tryonia that may be subject to conference and consultation procedures under section 7 of the Act are land management or other landscape-altering activities on Federal lands administered by the National Park Service as well as actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions on section 7 consultation and conference requirements.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at

50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed any of the following: (1) Import endangered wildlife into, or export from, the United States; (2) take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) endangered wildlife within the United States or on the high seas; (3) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such wildlife that has been taken illegally; (4) deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or (5) sell or offer for sale in interstate or foreign commerce. Certain exceptions to these prohibitions apply to employees or agents of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits for endangered wildlife are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for scientific purposes, for enhancing the propagation or survival of the species, or for take incidental to otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is the policy of the Services, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the extent known at the time a species is listed, specific activities that would not be considered likely to result in violation of section 9 of the Act. To the extent possible, activities that would be considered likely to result in violation would also be identified in as specific a manner as possible. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing.

At this time, we are unable to identify specific activities that would not be considered likely to result in a violation of section 9 of the Act beyond what is already clear from the descriptions of prohibitions or already excepted through our regulations at 50 CFR 17.21 (e.g., 50 CFR 17.21(c)(2), which provides that any person may take endangered wildlife in defense of his own life or the lives of others). Also, as discussed above, certain activities that are

prohibited under section 9 may be permitted under section 10 of the Act.

To the extent currently known, the following is a list of examples of activities that would be considered likely to result in violation of section 9 of the Act in addition to what is already clear from the descriptions of the prohibitions found at 50 CFR 17.21:

(1) Unauthorized handling or collecting of the Quitobaquito tryonia.

(2) Destruction/alteration of Quitobaquito tryonia habitat by discharge of fill material, draining, ditching, tiling, pond construction, stream channelization or diversion, or removal or destruction of emergent aquatic vegetation; or diversion or alteration of surface or ground water flow into or out of the Quitobaquito Springs complex (*i.e.*, due to roads, impoundments, discharge pipes, storm water detention basins, etc.) or in any body of water in which the Quitobaquito tryonia is known to occur.

(3) Direct or indirect destruction of riparian habitat where the Quitobaquito tryonia occurs.

(4) Introduction of nonnative species that compete with or prey upon the Quitobaquito tryonia, such as the introduction of nonnative fish and crayfish species into any waters in which the Quitobaquito tryonia is known to occur.

(5) Release of biological control agents that attack any life stage of this species in or near Quitobaquito tryonia habitat.

(6) Discharge of chemicals or fill material into any waters in which the Quitobaquito tryonia is known to occur.

The list above is intended to be illustrative and not exhaustive; additional activities that would be considered likely to result in violation of section 9 of the Act may be identified during coordination with the local field office, and in some instances (*e.g.*, with new or site-specific information), the Service may conclude that one or more activities identified here would not be considered likely to result in violation of section 9. Questions regarding whether specific activities would constitute violation of section 9 of the Act should be directed to the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species; and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the

Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat,

our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological

features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define “physical or biological features essential to the conservation of the species” as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Brooded young, juvenile, and adult Quitobaquito tryonia all need adequate spring flow and water quality to meet their resource functions, which include feeding, growth, survival, and breeding (Hershler 1984, p. 68; Hershler and Sada 2002, p. 256; Martinez and Thome 2006, p. 14). Specifically, spring flow must be

perennial to prevent desiccation and maintain stable water quality parameters.

Quitobaquito tryonia need adequate periphyton growth for food. *Tryonia* species are likely herbivores or detritivores that primarily graze on periphyton and macrophytes by scraping surfaces with their file-like radula (Pyron and Brown 2015, pp. 386, 401). Periphyton is a mixture of algae, bacteria, detritus, fungi, diatoms, and protozoa contained within a polysaccharide matrix known as a biofilm that grows on exposed surfaces, such as macrophytes or substrate (Lysne et al. 2007, p. 649). Production of periphyton and algae in a natural spring system is likely tied to water quality, nutrient availability, and exposure to sunlight (Brown et al. 2008, p. 488; Martinez and Thome 2006, p. 14). Additionally, larger substrates (such as gravel or cobble) develop a richer periphyton coating than finer substrates (Brown and Lydeard 2010, p. 285). Therefore, periphyton is essential to the Quitobaquito tryonia because it is its primary food source.

Suitable substrate is important for shelter and periphyton growth. Substrate characteristics influence the abundance and productivity of springsnails. *Tryonia* spp. appear to use a broad array of substrate types, including cobble, gravel, sand, and silt (Hershler et al. 2011, entire), although Quitobaquito tryonia appear to be most abundant on hard substrates within the spring channel at Quitobaquito Springs (Bogan 2018, entire). We assume that if a substrate type has a higher density of Quitobaquito tryonia, then that substrate is preferred by the species when compared to other suitable substrates. Presumed preferred substrates include hard and/or coarse substrates, such as cobble and gravel, which increase springsnail productivity by promoting robust periphyton growth. Other suitable substrate includes fine-grained sediment, such as sand and silt. Suitable substrates still provide adequate food resources but are not as productive as presumed preferred substrates because of limited periphyton growth. Therefore, habitat with presumed preferred substrates or a combination of presumed preferred and suitable substrates is essential to the species.

Aquatic vegetation is also important for shelter and periphyton growth. Vegetation density influences the abundance and productivity of springsnails. We assume that vegetation that occurs at lower densities is preferable to the Quitobaquito tryonia when compared to higher densities of vegetation. Important vegetation

includes native macrophytes, such as sedges (*Schoenoplectus* spp.) and rushes (*Juncus* spp.), occurring at low densities that do not impede spring flow. Other native macrophytes may also be considered suitable for shelter and periphyton growth when they occur at higher densities. Therefore, habitat including aquatic vegetation present at levels that do not impede spring flow is essential to the species.

The introduction of nonnative or invasive predators has the potential to negatively affect springsnails (Hershler 1998, p. 14; Sada 2017, p. 11). The nonnative New Zealand mudsnail (*Potamopyrgus antipodarum*) is an invasive freshwater snail of the family Hydrobiidae that is known to compete with and slow the growth of native freshwater snails, including springsnails (Lysne and Koetsier 2008, pp. 103, 105; Lysne et al. 2007, pp. 647–653). New Zealand mudsnails may outcompete hydrobiid snails for food and shelter resources. Nonnative crayfish (notably *Faxonius virilis* and *Procambarus clarkii*) are known predators to springsnails and have been found in springs and streams at and near springsnail sites in Arizona. Crayfish have been found to consume snails that occupy similar habitats as springsnails and their eggs (Fernandez and Rosen 1996, pp. 24–25). Therefore, the absence of nonnative species, or a level of nonnative species low enough that it does not impede resource availability for or result in mortality of Quitobaquito tryonia individuals, is essential to the Quitobaquito tryonia.

Tryonia and other springsnails show a pattern of decreasing abundance with distance from the spring source (Hershler and Sada 2002, p. 256; Martinez and Thome 2006, p. 14; Rogowski 2012, pp. 34, 37), indicating that water chemistry such as stable dissolved oxygen, pH, conductivity, and temperature, as well as absence of or low enough levels of contaminants, may influence the distribution and abundance of springsnails (O'Brien and Blinn 1999, pp. 231–232; Mladenka and Minshall 2001, pp. 209–211; Malcom et al. 2005, p. 75; Martinez and Thome 2006, pp. 12–15; Lysne et al. 2007, p. 650). However, the full suite of water quality conditions that the Quitobaquito tryonia prefers has not been determined. Nevertheless, we assume that overall sufficient water quality that provides appropriate conditions for the Quitobaquito tryonia is essential to the species.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the Quitobaquito tryonia from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the SSA report (Service 2022, entire; available on <https://www.regulations.gov> under Docket No. FWS-R2-ES-2023-0073). We have determined that the following physical or biological features are essential to the conservation of the Quitobaquito tryonia:

(1) Perennially free-flowing spring water with sufficient flow rate.

(2) Sufficient amount of periphyton to support all life stages of the Quitobaquito tryonia.

(3) Presence of hard or coarse substrates (including cobble and gravel) or a combination of coarse and fine substrates (including sand and/or silt).

(4) Aquatic emergent and submergent vegetation, including native macrophytes such as sedges (*Schoenoplectus* spp.) and rushes (*Juncus* spp.), occurring at densities that do not impede spring flow.

(5) Water quality parameters that support all life stages of the Quitobaquito tryonia, including:

(a) Adequate levels of temperature, pH, and conductivity; and

(b) Absence of contaminants, or a level of contaminants low enough that it does not negatively impact necessary water quality conditions for Quitobaquito tryonia individuals.

(6) Absence of nonnative species, or a level of nonnative species low enough that it does not impede resource availability for or result in mortality of Quitobaquito tryonia individuals.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Quitobaquito tryonia may require special management considerations or protection to reduce the following threats: (1) reduction of spring discharge, (2) effects of climate change, and (3) spring modification.

Management activities that could ameliorate these threats and protect the quantity and quality of the habitat include, but are not limited to: (1)

decreasing groundwater pumping to maintain spring flow that supports spring habitat; (2) removing dense aquatic vegetation from the spring channel to maintain stream flow and provide a mosaic of habitat types throughout the spring channel; and (3) controlling and removing introduced nonnative predators and competitors, such as crayfish.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. No unoccupied areas have at least one essential physical or biological feature and a reasonable certainty of contributing to conservation of the species.

In order to analyze possible habitat locations, in November 2018, several seeps to the northwest of Quitobaquito Springs were surveyed, but none had perennial spring flow (Williams and Sorensen 2019, p. 9), which is essential for the Quitobaquito tryonia. In October 2020, two seeps east of Quitobaquito Pond were surveyed; Quitobaquito tryonia were detected at only Hillside Seep #2, one of the two surveyed locations. In November 2021, several additional seeps east of Quitobaquito Pond were surveyed and Hillside Seep #1 and #2 were revisited. Five seeps had low flow and possible springsnail habitat, but no Quitobaquito tryonia were found (Sorensen 2021, p. 10). There are other unnamed seeps that occur within the broader Quitobaquito Springs area that have yet to be fully surveyed for the Quitobaquito tryonia, but none of them occur in the historical range of the species. It is unknown how many seeps in the area have the perennial flow necessary for brooded young, juvenile, and adult Quitobaquito tryonia to meet their resource functions, which include feeding, growth, survival, and breeding (Service 2022, p. 13). Specifically, spring flow must be perennial to prevent desiccation and

maintain stable water quality parameters (Hershler 1984, p. 68; Hershler and Sada 2002, p. 256; Johnson et al. 2013, p. 248; Martinez and Thome 2006, p. 14). Therefore, for a seep to be suitable habitat and have reasonable certainty that it would contribute to the conservation of the Quitobaquito tryonia, it must contain the essential physical or biological feature of perennially free-flowing spring water with sufficient flow rate. In the current condition and in all plausible future scenarios, it is unlikely that any of the seeps in the area would contain or be able to be managed to achieve the spring flow necessary for the Quitobaquito tryonia, especially when conditions are exacerbated by climate change. Accordingly, for those springs that occur outside of the historical range, we cannot identify the exact habitat parameters that will ensure the success of the species there. Therefore, there are no areas other than those included in this proposed critical habitat designation that we are reasonably certain would contribute to the conservation of the Quitobaquito tryonia.

We are proposing to designate critical habitat units that we have determined based on the best scientific data available are known to be currently occupied and contain the physical or biological features essential to the conservation of the Quitobaquito tryonia. Additional areas outside the aquatic habitat within each subunit are included in the proposed designation to assist in maintaining the hydrology of the aquatic features. Sources of occupancy data on the Quitobaquito tryonia are from all available reports since monitoring of the species began in 2002 (Martinez and Sorensen 2016, entire; Bogan 2018, entire; Williams and Sorensen 2019, entire; AZGFD 2021, entire; Sorensen 2022, entire). We determined localities to be occupied at the time of listing if they are identified as extant in the SSA report (Service 2022, pp. 16–20). Extirpated populations are not included because the spring sources that supported them no longer have the essential physical or biological features to support the species now or in the future. Specifically, these areas no longer have water, and it is unlikely that groundwater would support spring flow in these areas.

We obtained information on ecology and habitat requirements of the Quitobaquito tryonia from multiple sources, as identified in the SSA report as explained above (Service 2022, pp. 7–13). For mapping of proposed critical habitat, we used Organ Pipe Cactus

National Monument geo-referenced data of aquatic habitats that have perennial spring flow, adequate water quality, and substrates and aquatic vegetation that support extant populations of the Quitobaquito tryonia. There are two areas that contain the physical or biological features needed by the Quitobaquito tryonia: a human-made concrete spring run and a natural seep. We delineated the extent of critical habitat along the spring run by the physical boundary of the concrete channel and southwest spring trench with an average width of 2 m (6.4 ft) along this length to capture areas where water pools along the channel. Water provided by the springs does not flow outside of this human-made channel and corresponding pools. For Hillside Seep #2, we delineated the extent of critical habitat along the seep from the point of origin of the seep downhill a distance of 15.2 m (50 ft), which is the longest known length of flow from the seep (Service 2022, p. 20). We included all area within 5 m (16.4 ft) of this length to capture any future hydrological changes of flow patterns that may occur over time in this area, both upslope and downslope of the seep. This also captures the habitat associated with the upslope and downslope of the watershed. In other words, this area incorporates most of the habitat that has the potential to impact the seep and any Quitobaquito tryonia individuals depending on that seep (Martin 2023b, pers. comm.). We used two different methods because the water in the channel is confined within a human-made concrete structure, and the seep is naturally occurring, so there is more variability in width of sheet flow (overland storm runoff).

In summary, for areas within the geographical area occupied by the species at the time of listing, we

delineated critical habitat unit boundaries using the following criteria:

- (1) We compiled all available data from observations of the Quitobaquito tryonia;
- (2) We identified, based on the best scientific data available, populations that are extant at the time of listing (current) versus those that are extirpated;
- (3) We identified areas containing the components comprising the essential physical or biological features that may require special management considerations or protection; and
- (4) We circumscribed boundaries of potential critical habitat based on the above information that reflect current habitat conditions.

While the human-made concrete spring run that provides habitat for the Quitobaquito tryonia is included in the proposed critical habitat designation for the species, when determining proposed critical habitat boundaries, we made every effort to avoid including other developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Quitobaquito tryonia. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such other developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect

the physical or biological features in the adjacent critical habitat. We propose to designate as critical habitat areas that we have determined are occupied at the time of listing (*i.e.*, currently occupied) and that contain one or more of the physical or biological features that are essential to support the life-history processes of the species.

One unit, composed of two subunits, is proposed for designation based on one or more of the physical or biological features being present to support the Quitobaquito tryonia's life-history processes. Both subunits contain all of the identified physical or biological features and support multiple life-history processes.

The proposed critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on <https://www.regulations.gov> at Docket No. FWS-R2-ES-2023-0073 and on our internet site at <https://www.fws.gov/office/arizona-ecological-services>.

Proposed Critical Habitat Designation

We are proposing one unit, composed of two subunits, as critical habitat for the Quitobaquito tryonia. The critical habitat area we describe below constitutes our current best assessment of areas that meet the definition of critical habitat for the Quitobaquito tryonia. Table 2 shows the proposed critical habitat unit and the approximate area of each subunit. Both subunits of the Quitobaquito Unit are occupied.

TABLE 2—PROPOSED CRITICAL HABITAT UNIT FOR THE QUITOBAQUITO TRYONIA

[Area estimates reflect all area within critical habitat boundaries]

Critical Habitat Unit	Critical Habitat Subunit	Land Ownership by Type	Size of Unit in Feet ² (Meters ²)	Occupied?
Quitobaquito Unit	A. Spring Channel	Federal (NPS)	4,455 (414)	Yes.
	B. Hillside Seep #2	Federal (NPS)	1,640 (152)	Yes.
Total .....	.....	.....	6,095 (566)	

Note: Area sizes may not sum due to rounding.

We present brief descriptions of both subunits, and reasons why they meet the definition of critical habitat for the Quitobaquito tryonia, below.

Subunit A: Spring Channel

Subunit A in the Quitobaquito Unit consists of 4,455 square feet (ft²) (414 square meters (m²)) of the spring channel. This subunit is occupied and contains all of the physical or biological

features essential to the conservation of the species. This subunit is entirely on Federal (NPS) land within Organ Pipe Cactus National Monument. Threats that are occurring in this area include decline in spring flow from groundwater withdrawal and drought, effects of

climate change, and spring modification. This subunit may require special management considerations, such as vegetation removal, and to the extent possible, protection from future groundwater withdrawals in close proximity. NPS is already actively managing this unit by periodically removing a portion of emergent and submerged vegetation to improve water flow from the spring source, and NPS has worked with U.S. Customs and Border Protection on placement of wells for border construction activities.

Subunit B: Hillside Seep #2

Subunit B in the Quitobaquito Unit consists of 1,640 ft² (152 m²) of a seep located approximately 338 ft (103 m) from the spring channel. This subunit is occupied and contains all of the physical or biological features essential to the conservation of the species. This subunit is entirely on Federal (NPS) land within Organ Pipe Cactus National Monument. Threats that are occurring in this area include decline in spring flow from groundwater withdrawal and drought, effects of climate change, and spring modification. This subunit may require the same special management considerations and protection as Subunit A. The NPS may manage this unit similar to the management discussed for Subunit A by periodically removing a portion of emergent and submerged vegetation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate consultation if any of the following four conditions occur: (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. The reinitiation requirement applies only to actions that remain subject to some discretionary Federal involvement or control. As provided in 50 CFR 402.16, the requirement to reinitiate consultations for new species listings or critical habitat designation does not apply to certain agency actions (e.g.,

land management plans issued by the Bureau of Land Management in certain circumstances).

Application of the “Destruction or Adverse Modification” Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would decrease the amount of water available in the spring channel or seep used by the Quitobaquito tryonia. Such activities could include, but are not limited to, groundwater pumping, impoundment, and water diversion. These activities could decrease the amount of springflow so that the spring channel or seep becomes smaller, intermittent, or dry, and thereby could reduce the amount of space, prey, and cover available for Quitobaquito tryonia.

(2) Actions that would alter habitat used by the Quitobaquito tryonia. Such actions could include the maintenance of springheads, stream or channel courses, and ponds. Maintaining springheads and human-made or natural spring channels will maximize the amount of springflow available to Quitobaquito tryonia. The spring channel that supports Quitobaquito tryonia was channelized and requires constant management to stop encroaching vegetation from completely filling in the channel.

(3) Actions that would impact water quality of the spring system used by the Quitobaquito tryonia. Such activities could include, but are not limited to, presence of contaminants, livestock grazing, and spring modification.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the “2016 Policy”); 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor’s opinion entitled, “The Secretary’s Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act” (M–37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to

use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to make clear the rational basis for our decision. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.”

The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. Section 3(f) of E.O. 12866, as amended by E.O. 14094, identifies four criteria when a regulation is considered a “significant regulatory action” and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of \$200 million or more in any given year (section 3(f)(1)). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for the Quitobaquito tryonia is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Quitobaquito tryonia (IEc 2023, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to

conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation.

The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impacts above and beyond the impacts of listing the species. As a result, we generally focus the screening analysis on areas of unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the Quitobaquito tryonia; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Quitobaquito tryonia, first we identified, in the IEM dated March 8, 2023, probable incremental economic impacts associated with the following categories of activities: (1) Federal lands management (NPS, Organ Pipe Cactus National Monument); (2) groundwater pumping; and (3) border security operations (U.S. Customs and Border Protection). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we list the species, in areas where the Quitobaquito tryonia is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they authorize, fund, or

carry out that may affect the species. If, when we list the species, we also finalize this proposed critical habitat designation, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations would include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.*, difference between the jeopardy and adverse modification standards) for the Quitobaquito tryonia's critical habitat. Because the designation of critical habitat for the Quitobaquito tryonia is being proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which would result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would likely adversely affect the essential physical or biological features of occupied critical habitat are also likely to adversely affect the species itself. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Quitobaquito tryonia consists of a single unit with two subunits currently occupied by the species. We are not proposing to designate any units of unoccupied habitat. The proposed Quitobaquito Unit totals 6,095 square feet (566 square meters) and is entirely within federally owned land at Organ Pipe Cactus National Monument. In this area, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that there would be any additional recommendations or project modifications to avoid adversely modifying critical habitat above those we would recommend for avoiding jeopardy. Therefore, only administrative costs of conducting any section 7

consultation are expected in all of the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

We estimate that approximately one informal consultation may occur annually in proposed critical habitat areas. Annual incremental costs to the Service, Federal action agencies, and third parties associated with this consultation are anticipated to be approximately \$2,600. The designation of critical habitat for the Quitobaquito tryonia, which is located on Federal lands, is not expected to trigger additional requirements under State or local regulations, nor is the designation expected to have perceptual effects on markets. Additional section 7 efforts to conserve the Quitobaquito tryonia are not predicted to result from the designation of critical habitat. As this economic screening analysis finds that the designation is not likely to result in additional or different project modifications, ancillary economic benefits are not anticipated. The above-mentioned administrative costs are highly unlikely to exceed \$200 million in a given year.

We are soliciting data and comments from the public on the DEA discussed above. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.*, a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of

“critical habitat.” However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to:

- (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications;
- (2) the importance of those implications; and
- (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion.

In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat

for Quitobaquito tryonia are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

Summary of Exclusions Considered Under Section 4(b)(2) of the Act

In preparing this proposal, we have determined that no HCPs or other management plans for the Quitobaquito tryonia currently exist, and the proposed designation does not include any Tribal lands or trust resources or any lands for which designation would have any economic or national security impacts. Therefore, we anticipate no impact on Tribal lands, partnerships, or HCPs from this proposed critical habitat designation; thus, as described above, we are not considering excluding any particular areas from the designation on the basis of the presence of conservation agreements or impacts to trust resources.

However, if through the public comment period we receive information that we determine indicates that there are potential economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under the authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we

do not exclude, we will fully describe our decision in the final rule for this action.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order (E.O.) 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas.

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the

public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical

small business firm’s business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant

energy action, and no statement of energy effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or Tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the

legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of \$200 million or greater in any year, that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a small government agency plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Quitobaquito tryonia in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Quitobaquito tryonia, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with

Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat is presented on a map, and the proposed

rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretaries' Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the proposed critical habitat for the Quitobaquito tryonia, so no Tribal lands would be affected by the proposed designation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at <https://www.regulations.gov> and upon request from the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Arizona Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by adding an entry for “Tryonia, Quitobaquito” in alphabetical order under SNAILS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
		SNAILS		
		*	*	*
Tryonia, Quitobaquito	<i>Tryonia quitobaquiae</i>	Wherever found	E	[Federal Register citation when published as a final rule]; 50 CFR 17.95(f). ^{CH}
*	*	*	*	*

■ 3. In § 17.95, amend paragraph (f) by adding an entry for “Quitobaquito Tryonia (*Tryonia quitobaquiae*)” following the entry for “Diamond tryonia (*Pseudotryonia adamantina*) and Gonzales tryonia (*Tryonia circumstriata*)” to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and Snails.*

* * * * *

Quitobaquito Tryonia (*Tryonia quitobaquiae*)

(1) The critical habitat unit and its subunits are depicted for Pima County, Arizona, on the map in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Quitobaquito tryonia consist of the following components:

(i) Perennially free-flowing spring water with sufficient flow rate;

(ii) Sufficient amount of periphyton to support all life stages of the Quitobaquito tryonia;

(iii) Presence of hard or coarse substrates (including cobble and gravel) or a combination of coarse and fine substrates (including sand and/or silt);

(iv) Aquatic emergent and submergent vegetation, including native macrophytes such as sedges (*Schoenoplectus* spp.) and rushes (*Juncus* spp.), occurring at densities that do not impede spring flow;

(v) Water quality parameters that support all life stages of the Quitobaquito tryonia, including:

(A) Adequate levels of temperature, pH, and conductivity; and

(B) Absence of contaminants, or a level of contaminants low enough that it does not negatively impact necessary water quality conditions for Quitobaquito tryonia individuals; and

(vi) Absence of nonnative species, or a level of nonnative species low enough that it does not impede resource availability for or result in mortality of Quitobaquito tryonia individuals.

(3) Critical habitat includes the human-made concrete spring run that provides habitat for the Quitobaquito tryonia; critical habitat does not include other human-made structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of the final rule.

(4) Data layers defining map units were created using ESRI ArcGIS mapping software along with various spatial layers. We used ground-truthed data provided by Organ Pipe Cactus National Monument staff that depicts all aquatic habitat used by the Quitobaquito tryonia, including southwest Quitobaquito Spring, a human-made trench that connects Quitobaquito Springs to a human-made channel, and a human-made channel that connects the southwest trench to the pond. ArcGIS was also used to calculate area in square feet and square meters, and was used to determine longitude and latitude coordinates in decimal degrees. The coordinate system used in mapping

and calculating area and locations within the unit was Universal Transverse Mercator (UTM) conformal projection with 1983 North American Datum in Zone 12. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's internet site at <https://www.fws.gov/office/arizona-ecological-services>, at <https://www.regulations.gov> at Docket No. FWS-R2-ES-2023-0073, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Quitobaquito Unit, Pima County, Arizona.

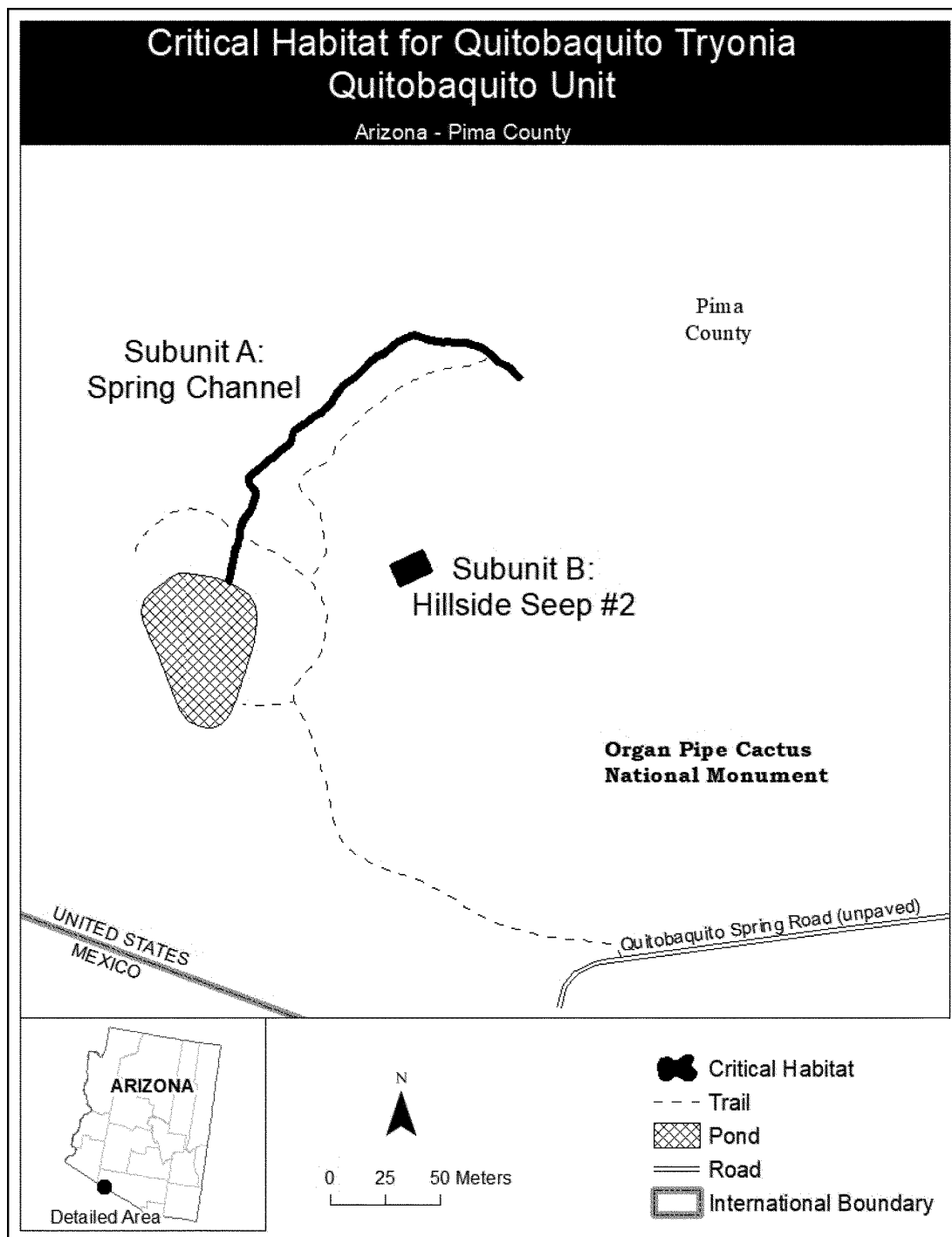
(i) Quitobaquito Unit consists of two subunits:

(A) Subunit A consists of 4,455 square feet (ft²) (414 square meters (m²)) of the spring channel. This subunit is entirely on federally owned land in Organ Pipe Cactus National Monument.

(B) Subunit B consists of 1,640 ft² (152 m²) of a seep located approximately 338 ft (103 m) from the spring channel. This subunit is entirely on federally owned land in Organ Pipe Cactus National Monument.

(ii) Map of Quitobaquito Unit follows: Figure 1 to Quitobaquito Tryonia (*Tryonia quitobaquiae*) paragraph (5)

BILLING CODE 4333-15-P



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Stephen Guertin,
*Acting Director, U.S. Fish and Wildlife
Service.*

[FR Doc. 2023-18547 Filed 9-12-23; 8:45 am]

BILLING CODE 4333-15-C

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 229**

[Docket No. 230907–0213]

RIN 0648–BM19

List of Fisheries for 2024

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comment.

SUMMARY: The NMFS publishes its proposed List of Fisheries (LOF) for 2024, as required by the Marine Mammal Protection Act (MMPA). The LOF for 2024 reflects new information on interactions between commercial fisheries and marine mammals. NMFS must classify each commercial fishery on the LOF into one of three categories under the MMPA based upon the level of mortality and serious injury of marine mammals that occurs incidental to each fishery. The classification of a fishery on the LOF determines whether participants in that fishery are subject to certain provisions of the MMPA, such as those on registration, observer coverage, and take reduction plan (TRP) requirements.

DATES: Comments must be received by October 13, 2023.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2023–0042, by either of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–NMFS–2023–0042 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Mail: Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information

submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT:

Jaclyn Taylor, Office of Protected Resources, 301–427–8402; Cheryl Cross, Greater Atlantic Region, 978–281–9100; Jessica Powell, Southeast Region, 727–824–5312; Dan Lawson, West Coast Region, 206–526–4740; Suzie Teerlink, Alaska Region, 907–586–7240; Elena Duke, Pacific Islands Region, 808–725–5085. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:**What is the List of Fisheries?**

Section 118 of the MMPA requires NMFS to place all U.S. commercial fisheries into one of three categories based on the level of incidental mortality and serious injury of marine mammals occurring in each fishery (16 U.S.C. 1387(c)(1)). The classification of a fishery on the LOF determines whether participants in that fishery may be required to comply with certain provisions of the MMPA, such as those on registration, observer coverage, and take reduction plan requirements. NMFS must reexamine the LOF annually, considering new information in the Marine Mammal Stock Assessment Reports (SARs) and other relevant sources, and publish in the **Federal Register** any necessary changes to the LOF after notice and opportunity for public comment (16 U.S.C. 1387(c)(1)(C)).

How does NMFS determine in which category a fishery is placed?

The definitions for the fishery classification criteria can be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2). The criteria are also summarized here.

Fishery Classification Criteria

The fishery classification criteria consist of a two-tiered, stock-specific approach that first addresses the total impact of all fisheries on each marine mammal stock and then addresses the impact of individual fisheries on each stock. This approach is based on consideration of the rate, in numbers of animals per year, of incidental mortalities and serious injuries of marine mammals due to commercial fishing operations relative to the potential biological removal (PBR) level

for each marine mammal stock. The MMPA (16 U.S.C. 1362 (20)) defines the PBR level as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock, while allowing that stock to reach or maintain its optimum sustainable population. This definition can also be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2).

Tier 1: Tier 1 considers the cumulative fishery mortality and serious injury for a particular stock. If the total annual mortality and serious injury of a marine mammal stock, across all fisheries, is less than or equal to 10 percent of the PBR level of the stock, all fisheries interacting with the stock will be placed in Category III (unless those fisheries interact with other stock(s) for which total annual mortality and serious injury is greater than 10 percent of PBR). Otherwise, these fisheries are subject to the next tier (Tier 2) of analysis to determine their classification.

Tier 2: Tier 2 considers fishery-specific mortality and serious injury for a particular stock.

Category I: Annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the PBR level (i.e., frequent incidental mortality and serious injury of marine mammals).

Category II: Annual mortality and serious injury of a stock in a given fishery is greater than 1 percent and less than 50 percent of the PBR level (i.e., occasional incidental mortality and serious injury of marine mammals).

Category III: Annual mortality and serious injury of a stock in a given fishery is less than or equal to 1 percent of the PBR level (i.e., a remote likelihood of or no known incidental mortality and serious injury of marine mammals).

Additional details regarding how the categories were determined are provided in the preamble to the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995).

Because fisheries are classified on a per-stock basis, a fishery may qualify as one category for one marine mammal stock and another category for a different marine mammal stock. A fishery is typically classified on the LOF at its highest level of classification (e.g., a fishery qualifying for Category III for one marine mammal stock and for Category II for another marine mammal stock will be listed under Category II). Stocks driving a fishery's classification are denoted with a superscript “1” in tables 1 and 2.

Other Criteria That May Be Considered

The tier analysis requires a minimum amount of data, and NMFS does not have sufficient data to perform a tier analysis on certain fisheries. Therefore, NMFS has classified certain fisheries by analogy to other fisheries that use similar fishing techniques or gear that are known to cause mortality or serious injury of marine mammals, or according to factors discussed in the final LOF for 1996 (60 FR 67063, December 28, 1995) and listed in the regulatory definition of a Category II fishery. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, NMFS will determine whether the incidental mortality or serious injury is “occasional” by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fishermen reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator for Fisheries (50 CFR 229.2).

Further, eligible commercial fisheries not specifically identified on the LOF are deemed to be Category II fisheries until the next LOF is published (50 CFR 229.2).

How does NMFS determine which species or stocks are included as incidentally killed or injured in a fishery?

The LOF includes a list of marine mammal species and/or stocks incidentally killed or injured in each commercial fishery. The list of species and/or stocks incidentally killed or injured includes “serious” and “non-serious” documented injuries as described later in the *List of Species and/or Stocks Incidentally Killed or Injured in the Pacific Ocean* and *List of Species and/or Stocks Incidentally Killed or Injured in the Atlantic Ocean, Gulf of Mexico, and Caribbean* sections. To determine which species or stocks are included as incidentally killed or injured in a fishery, NMFS annually reviews the information presented in the current SARs and injury determination reports. SARs are brief reports summarizing the status of each stock of marine mammals occurring in waters under U.S. jurisdiction, including information on the identity and geographic range of the stock, population statistics related to abundance, trend, and annual productivity, notable habitat concerns,

and estimates of human-caused mortality and serious injury (M/SI) by source. The SARs are based upon the best available scientific information and provide the most current and inclusive information on each stock’s PBR level and level of interaction with commercial fishing operations. The best available scientific information used in the SARs and reviewed for the 2024 LOF generally summarizes data from 2016–2020. NMFS also reviews other sources of new information, including injury determination reports, bycatch estimation reports, observer data, logbook data, stranding data, disentanglement network data, fishermen self-reports (*i.e.*, MMPA mortality/injury reports), and anecdotal reports from that time period. In some cases, more recent information may be available and used in the LOF.

For fisheries with observer coverage, species or stocks are generally removed from the list of marine mammal species and/or stocks incidentally killed or injured if no interactions are documented in the five-year timeframe summarized in that year’s LOF. For fisheries with no observer coverage and for observed fisheries with evidence indicating that undocumented interactions may be occurring (*e.g.*, fishery has low observer coverage and stranding network data include evidence of fisheries interactions that cannot be attributed to a specific fishery), species and stocks may be retained for longer than five years. For these fisheries, NMFS will review the other sources of information listed above and use its discretion to decide when it is appropriate to remove a species or stock.

Where does NMFS obtain information on the level of observer coverage in a fishery on the LOF?

The best available information on the level of observer coverage and the spatial and temporal distribution of observed marine mammal interactions is presented in the SARs. Data obtained from the observer program and observer coverage levels are important tools in estimating the level of marine mammal mortality and serious injury in commercial fishing operations. Starting with the 2005 SARs, each Pacific and Alaska SAR includes an appendix with detailed descriptions of each Category I and II fishery on the LOF, including the observer coverage in those fisheries. For Atlantic fisheries, this information can be found in the LOF Fishery Fact Sheets. The SARs do not provide detailed information on observer coverage in Category III fisheries because, under the MMPA, Category III

fisheries are not required to accommodate observers aboard vessels due to the remote likelihood of mortality and serious injury of marine mammals. Fishery information presented in the SARs’ appendices and other resources referenced during the tier analysis may include: level of observer coverage; target species; levels of fishing effort; spatial and temporal distribution of fishing effort; characteristics of fishing gear and operations; management and regulations; and interactions with marine mammals. Copies of the SARs are available on the NMFS Office of Protected Resources website at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>. Information on observer coverage levels in Category I, II, and III fisheries can be found in the fishery fact sheets on the NMFS Office of Protected Resources’ website: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>. Additional information on observer programs in commercial fisheries can be found on the NMFS National Observer Program’s website: <https://www.fisheries.noaa.gov/national/fisheries-observers/national-observer-program>.

How do I find out if a specific fishery is in Category I, II, or III?

The LOF includes three tables that list all U.S. commercial fisheries by Category. table 1 lists all of the commercial fisheries in the Pacific Ocean (including Alaska); table 2 lists all of the commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean; and table 3 lists all U.S. authorized commercial fisheries on the high seas. A fourth table, table 4, lists all commercial fisheries managed under applicable TRPs or take reduction teams (TRT).

Are high seas fisheries included on the LOF?

Beginning with the 2009 LOF, NMFS includes high seas fisheries in table 3 of the LOF, along with the number of valid High Seas Fishing Compliance Act (HSFCA) permits in each fishery. As of 2004, NMFS issues HSFCA permits only for high seas fisheries analyzed in accordance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The authorized high seas fisheries are broad in scope and encompass multiple specific fisheries identified by gear type. For the purposes of the LOF, the high seas fisheries are subdivided based on gear type (*e.g.*, trawl, longline, purse

seine, gillnet, troll, *etc.*) to provide more detail on composition of effort within these fisheries. Many fisheries operate in both U.S. waters and on the high seas, creating some overlap between the fisheries listed in tables 1 and 2 and those in table 3. In these cases, the high seas component of the fishery is not considered a separate fishery, but an extension of a fishery operating within U.S. waters (listed in table 1 or 2). NMFS designates those fisheries in tables 1, 2, and 3 with an asterisk (*) after the fishery's name. The number of HSFCA permits listed in table 3 for the high seas components of these fisheries operating in U.S. waters does not necessarily represent additional effort that is not accounted for in tables 1 and 2. Many vessels/participants holding HSFCA permits also fish within U.S. waters and are included in the number of vessels and participants operating within those fisheries in tables 1 and 2.

HSFCA permits are valid for 5 years, during which time Fishery Management Plans (FMPs) can change. Therefore, some vessels/participants may possess valid HSFCA permits without the ability to fish under the permit because it was issued for a gear type that is no longer authorized under the most current FMP. For this reason, the number of HSFCA permits displayed in table 3 is likely higher than the actual U.S. fishing effort on the high seas. For more information on how NMFS classifies high seas fisheries on the LOF, see the preamble text in the final 2009 LOF (73 FR 73032, December 1, 2008). Additional information about HSFCA permits can be found at <https://www.fisheries.noaa.gov/permit/high-seas-fishing-permits>.

Where can I find specific information on fisheries listed on the LOF?

Starting with the 2010 LOF, NMFS developed summary documents, or fishery fact sheets, for each Category I and II fishery on the LOF. These fishery fact sheets provide the full history of each Category I and II fishery, including: (1) when the fishery was added to the LOF; (2) the basis for the fishery's initial classification; (3) classification changes to the fishery; (4) changes to the list of species and/or stocks incidentally killed or injured in the fishery; (5) fishery gear and methods used; (6) observer coverage levels; (7) fishery management and regulation; and (8) applicable TRPs or TRTs, if any. These fishery fact sheets are updated after each final LOF and can be found under "How Do I Find Out if a Specific Fishery is in Category I, II, or III?" on the NMFS Office of Protected Resources' website: <https://www.fisheries.noaa.gov/national/>

marine-mammal-protection/marine-mammal-protection-act-list-fisheries, linked to the "List of Fisheries Summary" table. NMFS is developing similar fishery fact sheets for each Category III fishery on the LOF. However, due to the large number of Category III fisheries on the LOF and the lack of accessible and detailed information on many of these fisheries, the development of these fishery fact sheets is taking significant time to complete. NMFS began posting Category III fishery fact sheets online with the LOF for 2016.

Am I required to register under the MMPA?

Owners of vessels or gear engaging in a Category I or II fishery are required under the MMPA (16 U.S.C. 1387(c)(2)), as described in 50 CFR 229.4, to register with NMFS and obtain a marine mammal authorization to lawfully take marine mammals incidental to commercial fishing operations. The take of threatened or endangered marine mammals requires an additional authorization. Owners of vessels or gear engaged in a Category III fishery are not required to register with NMFS or obtain a marine mammal authorization.

How do I register, renew and receive my Marine Mammal Authorization Program authorization certificate?

NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program (MMAP), with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Participants in these fisheries are automatically registered under the MMAP and are not required to submit registration or renewal materials.

In the Pacific Islands, West Coast, and Alaska regions, NMFS will issue vessel or gear owners an authorization certificate via U.S. mail or with their state or Federal license or permit at the time of issuance or renewal. In the Southeast Region, NMFS will issue vessel or gear owners an authorization certificate via U.S. mail automatically at the beginning of each calendar year. In the Greater Atlantic Region, NMFS will issue vessel or gear owners an authorization certificate electronically. The certificate can be downloaded and/or printed at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-authorization-program#obtaining-a-marine-mammal-authorization-certificate>. Printed copies can be mailed upon request by

contacting nmfs.gar.mmapcert@noaa.gov or 978-281-9120.

Vessel or gear owners who participate in fisheries in these regions and have not received authorization certificates by the beginning of the calendar year, or with renewed fishing licenses, must contact the appropriate NMFS Regional Office (see **FOR FURTHER INFORMATION CONTACT**). Authorization certificates may also be obtained by visiting the MMAP website <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-authorization-program#obtaining-a-marine-mammal-authorization-certificate>.

The authorization certificate, or a copy, must be on board the vessel while it is operating in a Category I or II fishery, or for non-vessel fisheries, in the possession of the person in charge of the fishing operation (50 CFR 229.4(e)). Although efforts are made to limit the issuance of authorization certificates to only those vessel or gear owners that participate in Category I or II fisheries, not all state and Federal license or permit systems distinguish between fisheries as classified by the LOF. Therefore, some vessel or gear owners in Category III fisheries may receive authorization certificates even though they are not required for Category III fisheries.

Individuals fishing in Category I and II fisheries for which no state or Federal license or permit is required must register with NMFS by contacting their appropriate Regional Office (see **ADDRESSES**).

Am I required to submit reports when I kill or injure a marine mammal during the course of commercial fishing operations?

In accordance with the MMPA (16 U.S.C. 1387(e)) and 50 CFR 229.6, any vessel owner or operator, or gear owner or operator (in the case of non-vessel fisheries), participating in a fishery listed on the LOF must report to NMFS all incidental mortalities and injuries of marine mammals that occur during commercial fishing operations, regardless of the category in which the fishery is placed (I, II, or III) within 48 hours of the end of the fishing trip or, in the case of non-vessel fisheries, fishing activity. "Injury" is defined in 50 CFR 229.2 as a wound or other physical harm. In addition, any animal that ingests fishing gear or any animal that is released with fishing gear entangling, trailing, or perforating any part of the body is considered injured, regardless of the presence of any wound or other evidence of injury, and must be reported.

Mortality/injury reporting forms and instructions for submitting forms to NMFS can be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-authorization-program#reporting-a-death-or-injury-of-a-marine-mammal-during-commercial-fishing-operations> or by contacting the appropriate regional office (see **FOR FURTHER INFORMATION CONTACT**). Forms may be submitted via any of the following means: (1) online using the electronic form; (2) emailed as an attachment to nmfs.mireport@noaa.gov; (3) faxed to the NMFS Office of Protected Resources at 301-713-0376; or (4) mailed to the NMFS Office of Protected Resources (mailing address is provided on the postage-paid form that can be printed from the web address listed above). Reporting requirements and procedures are found in 50 CFR 229.6.

Am I required to take an observer aboard my vessel?

Individuals participating in a Category I or II fishery are required to accommodate an observer aboard their vessel(s) upon request from NMFS. MMPA section 118 states that the Secretary is not required to place an observer on a vessel if the facilities for quartering an observer or performing observer functions are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; thereby authorizing the exemption of vessels too small to safely accommodate an observer from this requirement. Observer requirements are found in 50 CFR 229.7.

Am I required to comply with any marine mammal TRP regulations?

Table 4 provides a list of fisheries affected by TRPs and TRTs. TRP regulations are found at 50 CFR 229.30 through 229.37. A description of each TRT and copies of each TRP can be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>. It is the responsibility of fishery participants to comply with applicable take reduction regulations.

Where can I find more information about the LOF and the MMAP?

Information regarding the LOF and the MMAP, including registration procedures and forms; current and past LOFs; descriptions of each Category I and II fishery and some Category III fisheries; observer requirements; and marine mammal mortality/injury

reporting forms and submittal procedures; may be obtained at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-list-fisheries>, or from any NMFS Regional Office at the addresses listed below:

NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930-2298, Attn: Cheryl Cross;

NMFS, Southeast Region, 263 13th Avenue South, St. Petersburg, FL 33701, Attn: Jessica Powell;

NMFS, West Coast Region, Long Beach Office, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, Attn: Dan Lawson;

NMFS, Alaska Region, Protected Resources, P.O. Box 22668, 709 West 9th Street, Juneau, AK 99802, Attn: Suzie Teerlink; or

NMFS, Pacific Islands Regional Office, Protected Resources Division, 1845 Wasp Blvd., Building 176, Honolulu, HI 96818, Attn: Elena Duke.

Sources of Information Reviewed for the 2024 LOF

NMFS reviewed the marine mammal incidental mortality and serious injury information presented in the SARs for all fisheries to determine whether changes in fishery classification are warranted. The SARs are based on the best scientific information available at the time of preparation, including the level of mortality and serious injury of marine mammals that occurs incidental to commercial fishery operations and the PBR levels of marine mammal stocks. The information contained in the SARs is reviewed by regional Scientific Review Groups (SRGs) representing Alaska, the Pacific (including Hawaii), and the U.S. Atlantic, Gulf of Mexico, and Caribbean. The SRGs were established by the MMPA to review the science that informs the SARs, and to advise NMFS on marine mammal population status, trends, and stock structure; uncertainties in the science, research needs, and other issues.

NMFS also reviewed other sources of new information, including marine mammal stranding and entanglement data, observer program data, fishermen self-reports, reports to the SRGs, conference papers, FMPs, and ESA documents.

The LOF for 2024 was based on, among other things, stranding data; fishermen self-reports; and SARs, primarily the 2022 SARs, which are based on data from 2016–2020. The SARs referenced in this LOF include: 2021 (87 FR 47385, August 3, 2022) and 2022 (88 FR 54592, August 11, 2023). The SARs are available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>.

www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.

Request for Public Input on Aquaculture Fishery Descriptions

As information on risks to marine mammals from aquaculture remains limited, NMFS is soliciting public comment to inform how we evaluate the potential risk to marine mammals from aquaculture operations for future LOFs. Specifically, we are requesting information on the following in both state and Federal waters in the Atlantic, Caribbean and Pacific:

1. Incidences of marine mammal interactions with aquaculture gear, including details of where and when these interactions occurred, the gear type(s) involved, and whether or not mortality and/or injury occurred.

2. Gear characteristics, operational practices used (e.g., anchoring systems, deterrence technologies to avoid interactions), and temporal and spatial variation in aquaculture operations.

3. Practical ways of grouping different aquaculture gears into a single fishery, such as grouping according to regional differences and/or operational and/or gear characteristics (e.g., if similar gears are used to farm shellfish and macroalgae, both target species should be listed under the same fishery).

4. How integrated multi-trophic aquaculture (the cooperative cultivation of multiple organisms occupying different trophic levels) should be characterized. For example, whether multi-trophic aquaculture should be classified holistically as a separate fishery, or by the gear type that presents the highest risk amongst the gear types that are being used.

Summary of Changes to the LOF for 2024

The following summarizes changes to the LOF for 2024, including the classification of fisheries, fisheries listed, the estimated number of vessels/persons in a particular fishery, and the species and/or stocks that are incidentally killed or injured in a particular fishery. In the 2022 Pacific and Alaska SARs, stock structure for humpback whales and the Southeast Alaska harbor porpoise were revised, respectively. The three existing North Pacific humpback whale stocks (Central North Pacific, Western North Pacific and CA/OR/WA) were replaced by five stocks: (1) Western North Pacific, (2) Hawai'i, (3) Mexico-North Pacific, (4) Central America/Southern Mexico CA/OR/WA and (5) Mainland Mexico-CA/OR/WA (Young *et al.*, 2023, Carretta *et*

al., 2023). The Southeast Alaska harbor porpoise stock was revised and split into three stocks: (1) the Northern Southeast Alaska inland waters, (2) Southern Southeast Alaska inland waters, and (3) Yakutat/Southeast Alaska offshore waters (Young *et al.*, 2023). Changes to the LOF for 2024 based on these revised stock structures are summarized below.

NMFS adds one fishery, removes six fisheries and reclassifies four fisheries in the LOF for 2024. NMFS also makes changes to the estimated number of vessels/persons and list of species and/or stocks killed or injured in certain fisheries. The classifications and definitions of U.S. commercial fisheries for 2024 are identical to those provided in the LOF for 2023, except for the changes discussed below. State and regional abbreviations used in the following paragraphs include: AK (Alaska), CA (California), FL (Florida), GA (Georgia), HI (Hawaii), NC (North Carolina), OR (Oregon), SC (South Carolina), WA (Washington) and WNA (Western North Atlantic).

Commercial Fisheries in the Pacific Ocean

Classification of Fisheries

NMFS proposes to reclassify the Category II AK Southeast salmon drift gillnet fishery to a Category I fishery based on M/SI of the Southern Southeast Alaska inland waters stock of harbor porpoise. Mean annual estimated M/SI of the Southern Southeast Alaska inland waters stock of harbor porpoise in the AK Southeast salmon drift gillnet fishery is 7.4 which is 121 percent of the stock's PBR (6.1) (Young *et al.*, 2023). Therefore, because the estimated M/SI is greater than or equal to 50 percent of PBR (Tier 2 analysis), NMFS proposes to reclassify the AK Southeast salmon drift gillnet fishery from a Category II to a Category I fishery.

NMFS proposes to reclassify the Category II CA Dungeness crab pot fishery to a Category I fishery based on M/SI of the Central America/Southern Mexico-CA/OR/WA stock of humpback whale. Mean annual estimated M/SI of the Central America/Southern Mexico-CA/OR/WA stock of humpback whale is 2.01 which is 57 percent of the stock's PBR (3.5 whales) (Carretta *et al.*, 2023). Therefore, because the estimated M/SI is greater than or equal to 50 percent of PBR, NMFS proposes to reclassify the CA Dungeness crab pot fishery from a Category II to a Category I fishery.

NMFS proposes to reclassify the Category II AK Bering Sea, Aleutian Islands Pacific cod pot fishery to a Category III fishery. The Category II

classification of this fishery was based on the mean annual estimated M/SI of the Western North Pacific stock of humpback whale. Total annual fishery M/SI for the Western North Pacific stock of humpback whale is 0.012 and PBR for the stock is 0.2 (Young *et al.*, 2023). A Tier 1 analysis indicates total annual M/SI for the Western North Pacific stock of humpback whale is six percent of PBR. Therefore, since total cumulative fishery M/SI is less than 10 percent for the Western North Pacific stock of humpback whale and no other stocks are driving the Category II classification of this fishery, NMFS proposes to reclassify the AK Bering Sea, Aleutian Islands Pacific cod pot fishery to a Category III fishery.

Fishery Name and Organizational Changes and Clarification

NMFS proposes to combine the Category III AK Dungeness crab fishery with the Category III AK miscellaneous invertebrates handpick fishery. These two fisheries are prosecuted in the same way and generally at the same time.

NMFS proposes to remove the Category III AK roe herring and food/bait herring beach seine fishery from the LOF because there are no participants in this fishery.

NMFS proposes to remove the Category III AK state-managed waters of Prince William Sound groundfish trawl fishery. This fishery is included in the Category III AK Gulf of Alaska trawl fisheries.

NMFS proposes to remove the Category III AK Bering Sea, Aleutian Islands groundfish hand troll and dinglebar troll fishery from the LOF because there are no participants in this fishery.

NMFS proposes to remove the Category III AK herring spawn on kelp dive hand/mechanical collection fishery from the LOF because there are no participants in this fishery.

NMFS proposes to add the superscript "1" to the southern Southeast Alaska inland waters stocks of harbor porpoise to indicate the stock is driving the Category I classification of the AK Southeast salmon drift gillnet fishery.

NMFS proposes to add the superscript "1" to the Central America/Southern Mexico-CA/OR/WA stocks of humpback whale to indicate the stock is driving the Category I classification of the CA Dungeness crab pot fishery. NMFS also proposes to remove the superscript "1" from Eastern North Pacific stock of blue whale to indicate the stock is not driving the Category I classification of the CA Dungeness crab pot fishery.

NMFS proposes to remove the superscript "1" from the CA/OR/WA

stock of minke whale to indicate the stock is no longer driving the Category II classification of the CA thresher shark/swordfish drift gillnet (≥ 14 inch (in) mesh) fishery.

NMFS proposes to add the superscript "1" to the Central America/Southern Mexico-CA/OR/WA stock of humpback whale to indicate the stock is driving the Category II classification of the CA halibut/white seabass and other species set gillnet (> 3.5 in mesh) fishery.

NMFS proposes to add the superscript "2" to the Category II AK Cook Inlet salmon set gillnet fishery to indicate this fishery is classified by analogy. This fishery was originally classified by analogy to other Category II Alaska gillnet fisheries on the 1996 LOF (60 FR 67063, December 28, 1995).

NMFS proposes to remove the superscript "2" from the Category II AK Yakutat salmon set gillnet fishery to indicate this fishery is not classified by analogy to other Category II gillnet fisheries. Alaska marine mammal observer program (AMMOP) bycatch data is used to estimate incidental M/SI in this fishery. NMFS also proposes to add the superscript "1" to the Yakutat/Southeast Alaska offshore waters stock of harbor porpoise to indicate the stock is driving the Category II classification of the AK Yakutat salmon set gillnet fishery.

NMFS proposes to remove the superscript "1" from both the Eastern North Pacific Alaska resident stock of killer whale and Western North Pacific stock of humpback whale to indicate the stocks are no longer driving the Category II classification of the AK Bering Sea, Aleutian Islands flatfish trawl fishery.

NMFS proposes to add the superscript "1" to the Central America/Southern Mexico-CA/OR/WA stock of humpback whale to indicate the stock is driving the Category II classification of the CA coonstripe shrimp pot fishery.

NMFS proposes to add the superscript "1" to the Central America/Southern Mexico-CA/OR/WA stock of humpback whale to indicate the stock is driving the Category II classification of the CA spiny lobster fishery.

NMFS proposes to add the superscript "1" to the Central America/Southern Mexico-CA/OR/WA stock of humpback whale to indicate the stock is driving the Category II classification of the CA spot prawn pot fishery.

NMFS proposes to add the superscript "1" to the Central America/Southern Mexico-CA/OR/WA stock of humpback whale to indicate the stock is driving the Category II classification of the OR Dungeness crab pot fishery.

NMFS proposes to add the superscript “1” to both the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale to indicate the stocks are driving the Category II classification of the WA/OR/CA sablefish pot fishery.

NMFS proposes to add the superscript “1” to the Central America/Southern Mexico-CA/OR/WA stock of humpback whale to indicate the stock is driving the Category II classification of the WA coastal Dungeness crab pot fishery.

NMFS proposes to add the superscript “1” to the North Pacific stock of sperm whale to indicate the stock is driving the Category II classification of the AK Gulf of Alaska sablefish longline fishery.

Number of Vessels/Persons

NMFS proposes to update the estimated number of vessels/persons in the Pacific Ocean (table 1) as follows:

Category I

- HI deep-set longline fishery from 150 to 146 vessels/persons;
- AK Southeast salmon drift gillnet fishery from 474 to 371 vessels/persons;

Category II

- AK Bristol Bay salmon drift gillnet fishery from 1,862 to 1,521 vessels/persons;
- AK Bristol Bay salmon set gillnet fishery from 979 to 855 vessels/persons;
- AK Kodiak salmon set gillnet fishery from 188 to 128 vessels/persons;
- AK Cook Inlet salmon set gillnet fishery from 736 to 479 vessels/persons;
- AK Cook Inlet salmon drift gillnet fishery from 569 to 355 vessels/persons;
- AK Peninsula/Aleutian Islands salmon drift gillnet fishery from 162 to 148 vessels/persons;
- AK Peninsula/Aleutian Islands salmon set gillnet fishery from 113 to 75 vessels/persons;
- AK Prince William Sound salmon drift gillnet fishery from 537 to 483 vessels/persons;
- AK Yakutat salmon set gillnet fishery from 168 to 95 vessels/persons;
- AK Bering Sea, Aleutian Islands flatfish trawl fishery from 32 to 29 vessels/persons;
- AK Bering Sea, Aleutian Islands pollock trawl fishery from 102 to 116 vessels/persons;
- AK Gulf of Alaska sablefish longline fishery from 295 to 177 vessels/persons;
- American Samoa longline fishery from 18 to 11 vessels/persons;
- HI shortline fishery from 11 to 8 vessels/persons;

Category III

- AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet fishery from 1,778 to 360 vessels/persons;
- AK Prince William Sound salmon set gillnet fishery from 29 to 25 vessels/persons;
- AK roe herring and food/bait herring gillnet fishery from 920 to 15 vessels/persons;
- HI inshore gillnet fishery from 27 to 26 vessels/persons;
- AK Cook Inlet salmon purse seine fishery from 83 to 16 vessels/persons;
- AK Kodiak salmon purse seine fishery from 376 to 159 vessels/persons;
- AK Southeast salmon purse seine fishery from 315 to 206 vessels/persons;
- AK roe herring and food/bait herring purse seine fishery from 356 to 31 vessels/persons;
- AK salmon beach seine fishery from 31 to 2 vessels/persons;
- AK salmon purse seine (Prince William Sound, Chignik, Alaska Peninsula) fishery from 936 to 298 vessels/persons;
- HI throw net, cast net fishery from 16 to 13 vessels/persons;
- HI seine net fishery from 16 to 17 vessels/persons;
- AK Gulf of Alaska groundfish hand troll and dinglebar troll fishery from unknown to 4 vessels/persons;
- AK salmon troll fishery from 1,908 to 850 vessels/persons;
- American Samoa tuna troll fishery from 3 to 6 vessels/persons;
- HI troll fishery from 1,293 to 1,124 vessels/persons;
- HI rod and reel fishery from 246 to 235 vessels/persons;
- Guam tuna troll fishery from 465 to 450 vessels/persons;
- AK Bering Sea, Aleutian Islands Pacific cod longline fishery from 45 to 26 vessels/persons;
- AK Bering Sea, Aleutian Islands sablefish longline fishery from 22 to 8 vessels/persons;
- AK Bering Sea, Aleutian Islands halibut longline fishery from 127 to 84 vessels/persons;
- AK Gulf of Alaska halibut longline fishery from 855 to 689 vessels/persons;
- AK Gulf of Alaska Pacific cod longline fishery from 92 to 23 vessels/persons;
- AK octopus/squid longline fishery from 3 to 0 vessels/persons;
- HI kaka line fishery from 16 to 17 vessels/persons;
- HI vertical line fishery from 5 to 6 vessels/persons;
- AK Bering Sea, Aleutian Islands Atka mackerel trawl fishery from 13 to 17 vessels/persons;
- AK Bering Sea, Aleutian Islands Pacific cod trawl fishery from 72 to 64 vessels/persons;

- AK Bering Sea, Aleutian Islands rockfish trawl fishery from 17 to 22 vessels/persons;
- AK Gulf of Alaska flatfish trawl fishery from 36 to 16 vessels/persons;
- AK Gulf of Alaska Pacific cod trawl fishery from 55 to 12 vessels/persons;
- AK Gulf of Alaska pollock trawl fishery from 67 to 60 vessels/persons;
- AK Gulf of Alaska rockfish trawl fishery from 43 to 35 vessels/persons;
- AK Kodiak food/bait herring otter trawl fishery from 4 to 0 vessels/persons;
- AK shrimp otter trawl and beam trawl fishery from 38 to 12 vessels/persons;
- AK Bering Sea, Aleutian Islands Pacific cod pot fishery from 59 to 80 vessels/persons;
- AK Bering Sea, Aleutian Islands sablefish pot fishery from 16 to 15 vessels/persons;
- AK Bering Sea, Aleutian Islands crab pot fishery from 540 to 73 vessels/persons;
- AK Gulf of Alaska crab pot fishery from 271 to 86 vessels/persons;
- AK Gulf of Alaska Pacific cod pot fishery from 116 to 48 vessels/persons;
- AK Gulf of Alaska sablefish pot fishery from 248 to 129 vessels/persons;
- AK Southeast Alaska shrimp pot fishery from 99 to 104 vessels/persons;
- AK shrimp pot, except Southeast fishery from 141 to 77 vessels/persons;
- AK octopus/squid pot fishery from 15 to 0 vessels/persons;
- HI crab trap fishery from 3 to 4 vessels/persons;
- HI crab net fishery from 3 to 4 vessels/persons;
- HI Kona crab loop net fishery from 24 to 13 vessels/persons;
- American Samoa bottomfish fishery from 46 to 44 vessels/persons;
- Commonwealth of the Northern Mariana Islands bottomfish fishery from 12 to 7 vessels/persons;
- Guam bottomfish fishery from 84 to 63 vessels/persons;
- HI bottomfish handline fishery from 404 to 382 vessels/persons;
- HI inshore handline fishery from 182 to 158 vessels/persons;
- HI pelagic handline fishery from 311 to 271 vessels/persons;
- AK Gulf of Alaska groundfish jig fishery from 214 to 68 vessels/persons;
- AK halibut jig fishery from 71 to 5 vessels/persons;
- AK herring spawn on kelp pound net fishery from 291 to 143 vessels/persons;
- AK Southeast herring roe/food/bait pound net fishery from 2 to 1 vessels/persons;
- AK clam fishery from 130 to 57 vessels/persons;

- AK miscellaneous invertebrates handpick fishery from 214 to 188 vessels/persons;
- HI black coral diving fishery from less than 3 to none recorded;
- HI handpick fishery from 28 to 25 vessels/persons;
- HI lobster diving fishery from 10 to 12 vessels/persons;
- HI spearfishing fishery from 79 to 67 vessels/persons, and
- HI aquarium collecting fishery from 39 to none recorded.

List of Species and/or Stocks Incidentally Killed or Injured in the Pacific Ocean

NMFS proposes to add the Beringia stock of bearded seal to the list of species/stocks incidentally killed or injured in the Category II AK Bering Sea, Aleutian Islands pollock trawl fishery based on an observed mortality in 2020 (Freed *et al.*, 2022).

NMFS proposes to add the U.S. stock of California sea lion to the list of species/stocks incidentally killed or injured in the Category III CA sea cucumber trawl fishery based on an observed mortality in 2019 (Carretta *et al.*, In Review).

NMFS proposes to remove the Hawaii stock of striped dolphin from the list of species/stocks incidentally killed or injured in the Category I HI deep-set longline fishery. This fishery is consistently monitored through an observer program. From 2016–2020, there have been no reported or observed M/SI within the EEZ in the HI deep-set longline fishery (Carretta *et al.*, 2023).

NMFS proposes to remove the Hawaii stock of fin whale and Central North Pacific stock of humpback whale from the list of species/stocks incidentally killed or injured in the Category II HI shallow-set longline fishery. This fishery has 100 percent observer coverage, and from 2016–2020, there have been no reported or observed M/SI within the EEZ in the HI shallow-set longline fishery (Carretta *et al.*, 2023).

NMFS proposes to revise marine mammal stock names on the list of species/stocks incidentally killed or injured for consistency with the current stock names in the SARs as follows:

Category II AK Bristol Bay Salmon Drift Gillnet Fishery

- Harbor seal, Bering Sea to harbor seal, Bristol Bay; and

Category II AK Gulf of Alaska Sablefish Longline

- Northern elephant seal, California to Northern elephant seal, California breeding.

NMFS proposes to update the harbor porpoise stocks on the list of species/

stocks incidentally killed or injured based on the revised stock structures in the 2022 SAR (Young *et al.*, 2023) as follows:

Category I AK Southeast Salmon Drift Gillnet Fishery

- Harbor porpoise, southeast Alaska to harbor porpoise, southern Southeast Alaska inland waters and harbor porpoise, northern Southeast Alaska inland waters, and

Category II AK Yakutat Salmon Set Gillnet Fishery

- Harbor porpoise, southeast Alaska to harbor porpoise, Yakutat/Southeast Alaska offshore waters.

NMFS proposes to update the humpback whale stocks on the list of species/stocks incidentally killed or injured based on the revised stock structures in the 2022 SAR (Carretta *et al.*, 2023; Young *et al.*, 2023) as follows:

Category I AK Southeast Salmon Drift Gillnet Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category II CA Thresher Shark/Swordfish Drift Gillnet (≥14 in Mesh) Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II CA Halibut/White Seabass and Other Species Set Gillnet (>3.5 in Mesh) Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II AK Kodiak Salmon Set Gillnet Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category II AK Cook Inlet Salmon Set Gillnet Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category II AK Prince William Sound Salmon Drift Gillnet Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category II AK Yakutat Salmon Set Gillnet Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category II AK Bering Sea, Aleutian Islands Pollock Trawl Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category II CA Coonstripe Shrimp Pot Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II CA Spiny Lobster Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II CA Spot Prawn Pot Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II CA Dungeness Crab Pot Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II OR Dungeness Crab Pot Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II WA/OR/CA Sablefish Pot Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category II WA Coastal Dungeness Crab Pot Fishery

- Humpback whale, CA/OR/WA to humpback whale, Central America/Southern Mexico-CA/OR/WA and humpback whale, Mainland Mexico-CA/OR/WA stock;

Category III AK Cook Inlet Salmon Purse Seine Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category III AK Kodiak Salmon Purse Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category III AK Southeast Salmon Purse Seine Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category III AK Bering Sea, Aleutian Islands Pacific Cod Pot Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category III Southeast Alaska Crab Pot Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category III Southeast Alaska Shrimp Pot Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific;

Category III HI Crab Trap Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i, and

Category III AK/WA/OR/CA Commercial Passenger Vessels Fishery

- Humpback whale, Central North Pacific to humpback whale, Hawai'i and humpback whale, Mexico-North Pacific.

Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean

Classification of Fisheries

NMFS proposes to reclassify the Category III U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net) fishery to a Category II based on M/SI of the Northern NC estuarine system stock of bottlenose dolphin. Mean annual estimated M/SI of the Northern NC estuarine stock of bottlenose dolphin in this fishery is 2.56 percent of PBR (7.8 dolphins). Because the estimated M/SI is between 1 and 50 percent of the stock's PBR, NMFS proposes to reclassify U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net) fishery from a Category III to a Category II fishery. NMFS also proposes to add the fishery to the list of affected

fisheries for the Bottlenose Dolphin Take Reduction Plan in table 4.

Addition of Fisheries

NMFS proposes to add the Virginia shrimp trawl fishery as a Category II fishery. This new fishery operates in the Commonwealth of Virginia's coastal waters (within three nautical miles) from October 1 through January 1. The fishery uses beam trawl gear with a fixed frame no larger than 4 feet by 16 feet, with mesh size ranging from 1.5–2.0 inches (stretched mesh). Tows are not to exceed 30 minutes in duration. There are 12 authorized permits for this fishery.

There is no information on marine mammal M/SI incidental to this fishery. Therefore, no marine mammal species/stocks are identified in table 2. Marine mammal species/stocks will be added to the list, if incidental mortalities or injuries are documented in this fishery.

The regulatory definition of a Category II fishery (50 CFR 229.2) provides for NMFS to evaluate other factors such as: fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area when there is no reliable information on the frequency of incidental M/SI in a given fishery. In the absence of reliable information on incidental M/SI, the Virginia shrimp trawl fishery is proposed as a Category II fishery, because there is no evidence of a remote likelihood of or no known incidental M/SI in the fishery.

Fishery Name and Organizational Changes and Clarification

NMFS proposes to remove the superscript “1” from the WNA stock of long-finned pilot whale to indicate the stock is no longer driving the Category II classification of the Northeast mid-water trawl (including pair trawl) fishery.

NMFS proposes to combine the Category II Northeast anchored float gillnet fishery into the Category I Northeast sink gillnet fishery. Federal Vessel Trip Report codes do not distinguish anchored float gillnet gear from other types of gillnet gear. Consequently, fishing effort for the Northeast anchored float gillnet fishery is included as part of reported fishing effort for the Northeast sink gillnet fishery. Additionally, marine mammal bycatch in the Northeast anchored float gillnet fishery is included in bycatch analyses for the Northeast sink gillnet fishery. The species that are currently

listed under the Northeast anchored float gillnet fishery are already included in the list of species incidentally taken in the Northeast sink gillnet fishery. This proposed change does not affect either fisheries' requirements under the Harbor Porpoise or Atlantic Large Whale TRPs (see table 4).

NMFS proposes to revise the fishery descriptions for the Category I Northeast/Mid-Atlantic American lobster trap/pot fishery and Category II Atlantic mixed species trap/pot fishery. NMFS proposes to add Jonah crab as a target species for the Category I Northeast/Mid-Atlantic American lobster trap/pot fishery and remove Jonah crab as a target species from the Category II Atlantic mixed species trap/pot fishery. NMFS also proposes to revise the name of the Category I Northeast/Mid-Atlantic American lobster and Jonah crab trap/pot fishery.

This proposed change aligns the Northeast/Mid-Atlantic American lobster and Atlantic mixed species trap/pot fisheries descriptions with how the two target species are collectively managed. Jonah crab distribution overlaps with that of American lobster, and Jonah crab are caught using the exact same gear used in the Category I Northeast/Mid-Atlantic American lobster trap/pot fishery. The gear used to target Jonah crab is consistent with what is currently described for the Category II Northeast/Mid-Atlantic American lobster trap/pot fishery. Currently, participation in the Jonah crab fishery is limited to American lobster permit holders. The Jonah crab fishery conforms to the specifications of the Interstate Fishery Management Plan for American Lobster and complies with regulatory requirements specified for each Lobster Management Area.

Number of Vessels/Persons

NMFS proposes to update the estimated number of vessels/persons in the Atlantic Ocean, Gulf of Mexico, and Caribbean (table 2) as follows:

Category I

- Northeast sink gillnet fishery from 4,072 to 4,924 vessels/persons;

Category II

- NC inshore gillnet fishery from 2,676 to 1,157 vessels/persons; and
- NC long haul seine fishery from 22 to 10 vessels/persons.

List of Species and/or Stocks Incidentally Killed or Injured in the Atlantic Ocean, Gulf of Mexico, and Caribbean

NMFS corrects an administrative error in table 2. NMFS proposes to update the

bottlenose dolphin stock name from FL Bay estuarine to FL Bay in the list of species/stocks incidentally killed or injured in the Category III FL spiny lobster trap/pot fishery.

NMFS proposes to add the WNA stock of harp seal to the list of species/stocks incidentally killed or injured in the Category I mid-Atlantic gillnet fishery. From 2015 through 2019, there were 14 observed harp seal mortalities in the mid-Atlantic gillnet fishery (Hayes *et al.*, 2022).

NMFS proposes to add the WNA stock of white-sided dolphin to the list of species/stocks incidentally killed or injured in the Category II Northeast mid-water trawl (including pair trawl) fishery based on a self-reported mortality in 2020.

NMFS proposes to add the Biscayne Bay estuarine stock of bottlenose dolphin to the list of species/stocks incidentally killed or injured in the Category II Atlantic blue crab trap/pot fishery. In 2020, one dolphin was disentangled from commercial blue crab trap/pot gear and released alive (Hayes *et al.*, 2023). The animal was determined to be seriously injured (Maze-Foley and Garrison, In Prep).

NMFS proposes to add the Charleston estuarine system stock of bottlenose dolphin to the list of species/stocks incidentally killed or injured in the Category III Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel fishery. In 2017, there was one mortality where monofilament line was found during the necropsy; however, it could not be determined whether the hook and line gear contributed to cause of death (Hayes *et al.*, 2023).

NMFS proposes to remove both the SC/GA coastal and Southern migratory coastal stocks of bottlenose dolphin from the list of species/stocks incidentally killed or injured in the Category II Southeast Atlantic gillnet fishery. This fishery is observed; and, from 2016–2020, there have been no reported or observed M/SI in this fishery (Hayes *et al.*, 2023).

NMFS proposes to remove the Charleston estuarine system stock of bottlenose dolphin from the list of species/stocks incidentally killed or injured in the Category II Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl fishery. This fishery is observed; and, from 2016–2020, there have been no reported or observed M/SI in this fishery (Hayes *et al.*, 2023).

Commercial Fisheries on the High Seas

Fishery Name and Organizational Changes and Clarification

NMFS proposes to remove Category II Atlantic Highly Migratory Species trawl fishery from the LOF because there are no participants in this fishery.

NMFS proposes to remove Category II South Pacific tuna fisheries troll fishery from the LOF because there are no participants in this fishery.

Number of Vessels/Persons

NMFS proposes to update the estimated number of HSFCA permits for high seas fisheries (table 3) as follows:

Category I

- Western Pacific pelagic (HI deep-set component) longline fishery from 150 to 146 HSFCA permits;

Category II

- Pacific highly migratory species drift gillnet fishery from 3 to 2 HSFCA permits;
- Western and Central Pacific Ocean tuna purse seine fishery from 34 to 14 HSFCA permits;
- South Pacific albacore troll longline fishery from 8 to 6 HSFCA permits;
- Pacific highly migratory species handline/pole and line fishery from 45 to 36 HSFCA permits;
- South Pacific albacore troll handline/pole and line fishery from 7 to 1 HSFCA permits;
- South Pacific albacore troll fishery from 24 to 23 HSFCA permits;
- Western Pacific pelagic troll fishery from 7 to 6 HSFCA permits;

Category III

- Northwest Atlantic bottom longline fishery from 2 to 1 HSFCA permits;
- Pacific highly migratory species longline fishery from 127 to 119 HSFCA permits;
- Pacific highly migratory species purse seine fishery from 2 to 1 HSFCA permits;
- Northwest Atlantic trawl fishery from 3 to 1 HSFCA permits; and
- Pacific highly migratory species troll fishery from 93 to 95 HSFCA permits.

List of Species and/or Stocks Incidentally Killed or Injured on the High Seas

NMFS proposes to remove the Hawaii stock of striped dolphin from the list of species/stocks incidentally killed or injured in the Category I Western Pacific Pelagic longline fishery (HI deep-set component). As noted in table 3, the list of marine mammal species and/or stocks killed or injured in this fishery is

identical to the list of marine mammal species and/or stocks killed or injured in U.S. waters component of the fishery, minus species and/or stocks that have geographic ranges exclusively in coastal waters. From 2016–2020, there have been no reported or observed M/SI in the HI deep-set longline fishery (Carretta *et al.*, 2023); the fishery is currently observed at about 20-percent coverage. Therefore, NMFS proposed to remove the stock from both the HI deep-set longline fishery and the Western Pacific Pelagic longline fishery (HI deep-set component).

NMFS proposes to remove the unknown stock of pygmy killer whale from the list of species/stocks incidentally killed or injured in the Category II Western and Central Pacific Ocean tuna purse seine fishery. From 2016–2020, there have been no reported or observed M/SI in the fishery (Carretta *et al.*, 2023); the fishery is currently observed at about 20 percent coverage.

NMFS proposes to remove the Hawaii stock of fin whale and Central North Pacific stock of humpback whale from the list of species/stocks incidentally killed or injured in the Category II Western Pacific Pelagic longline fishery (HI shallow-set component). As noted in table 3, the list of marine mammal species and/or stocks killed or injured in this fishery is identical to the list of marine mammal species and/or stocks killed or injured in U.S. waters component of the fishery, minus species and/or stocks that have geographic ranges exclusively in coastal waters. From 2016–2020, there have been no reported or observed M/SI in the HI shallow-set longline fishery (Carretta *et al.*, 2023), which is observed at 100 percent. Therefore, NMFS proposed to remove the stocks from both the HI shallow-set longline fishery and the Western Pacific Pelagic longline fishery (HI shallow-set component).

List of Fisheries

The following tables set forth the list of U.S. commercial fisheries according to their classification under section 118 of the MMPA. Table 1 lists commercial fisheries in the Pacific Ocean (including Alaska), table 2 lists commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean, table 3 lists commercial fisheries on the high seas, and table 4 lists fisheries affected by TRPs or TRTs.

In tables 1 and 2, the estimated number of vessels or persons participating in fisheries operating within U.S. waters is expressed in terms of the number of active participants in the fishery, when possible. If this information is not available, the

estimated number of vessels or persons licensed for a particular fishery is provided. If no recent information is available on the number of participants, vessels, or persons licensed in a fishery, then the number from the most recent LOF is used for the estimated number of vessels or persons in the fishery. NMFS acknowledges that, in some cases, these estimates may be inflations of actual effort. For example, the State of Hawaii does not issue fishery-specific licenses, and the number of participants reported in the LOF represents the number of commercial marine license holders who reported using a particular fishing gear type/method at least once in a given year, without considering how many times the gear was used. For these fisheries, effort by a single participant is counted the same whether the fisherman used the gear only once or every day. In the Mid-Atlantic and New England fisheries, the numbers represent the potential effort for each fishery, given the multiple gear types for which several state permits may allow. Changes made to Mid-Atlantic and New England fishery participants will not affect observer coverage or bycatch estimates, as observer coverage and bycatch estimates are based on vessel trip reports and landings data. Tables 1 and 2 serve to provide a description of the fishery's potential effort (state and Federal). If NMFS is able to gather more accurate information on the gear types used by state permit holders in the future, the numbers will be updated to reflect this change. For additional information on fishing effort in fisheries found on table 1 or 2, contact the relevant regional office (contact information included above in the section: Where can I find more

information about the LOF and the MMAP?).

For high seas fisheries, table 3 lists the number of valid HSFCA permits currently held. Although this likely overestimates the number of active participants in many of these fisheries, the number of valid HSFCA permits is the most reliable data on the potential effort in high seas fisheries at this time. As noted previously, the number of HSFCA permits listed in table 3 for the high seas components of fisheries that also operate within U.S. waters does not necessarily represent additional effort that is not accounted for in tables 1 and 2. Many vessels holding HSFCA permits also fish within U.S. waters and are included in the number of vessels and participants operating within those fisheries in tables 1 and 2.

Tables 1, 2, and 3 also list the marine mammal species and/or stocks incidentally killed or injured (seriously or non-seriously) in each fishery based on SARs, injury determination reports, bycatch estimation reports, observer data, logbook data, stranding data, disentanglement network data, fishermen self-reports (*i.e.*, MMAP reports), and anecdotal reports. The best available scientific information included in these reports is based on data through 2020. This list includes all species and/or stocks known to be killed or injured in a given fishery, but also includes species and/or stocks for which there are anecdotal records of a mortality or injury. Additionally, species identified by logbook entries, stranding data, or fishermen self-reports (*i.e.*, MMAP reports) may not be verified. In tables 1 and 2, NMFS has designated those species/stocks driving a fishery's classification (*i.e.*, the fishery

is classified based on mortalities and serious injuries of a marine mammal stock that are greater than or equal to 50 percent (Category I), or greater than 1 percent and less than 50 percent (Category II), of a stock's PBR) by a "1" after the stock's name.

In tables 1 and 2, there are several fisheries classified as Category II that have no recent documented mortalities or serious injuries of marine mammals, or fisheries that did not result in a mortality or serious injury rate greater than 1 percent of a stock's PBR level based on known interactions. NMFS has classified these fisheries by analogy to other Category I or II fisheries that use similar fishing techniques or gear that are known to cause mortality or serious injury of marine mammals, as discussed in the final LOF for 1996 (60 FR 67063, December 28, 1995), and according to factors listed in the definition of a "Category II fishery" in 50 CFR 229.2 (*i.e.*, fishing techniques, gear types, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fishermen reports, stranding data, and the species and distribution of marine mammals in the area). NMFS has designated those fisheries listed by analogy in tables 1 and 2 by adding a "2" after the fishery's name.

There are several fisheries in tables 1, 2, and 3 in which a portion of the fishing vessels cross the EEZ boundary and therefore operate both within U.S. waters and on the high seas. These fisheries, though listed separately on table 1 or 2 and table 3, are considered the same fisheries on either side of the EEZ boundary. NMFS has designated those fisheries in each table with an asterisk (*) after the fishery's name.

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
Category I		
<i>Longline/Set Line Fisheries:</i>		
HI deep-set longline*^	146	Bottlenose dolphin, HI Pelagic. False killer whale, HI Pelagic. ¹ False killer whale, MHI Insular. False killer whale, NWHI. Kogia spp. (Pygmy or dwarf sperm whale), HI. Risso's dolphin, HI. Rough-toothed dolphin, HI. Short-finned pilot whale, HI.
<i>Gillnet Fisheries:</i>		
AK Southeast salmon drift gillnet	474	Dall's porpoise, AK. Harbor porpoise, northern Southeast Alaska inland waters. Harbor porpoise, southern Southeast Alaska inland waters. ¹ Harbor seal, Southeast AK. Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific Pacific white-sided dolphin, North Pacific. Steller sea lion, Eastern U.S.
<i>Pot, Ring Net, and Trap Fisheries:</i>		
CA Dungeness crab pot	471	Blue whale, Eastern North Pacific.

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
		Gray whale, Eastern North Pacific. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. Killer whale, Eastern North Pacific GOA, BSAI transient. Killer whale, West Coast transient. Northern elephant seal, CA breeding.
Category II		
<i>Gillnet Fisheries:</i>		
CA thresher shark/swordfish drift gillnet (≥14 in mesh) *	21	Bottlenose dolphin, CA/OR/WA offshore. California sea lion, U.S. Dall's porpoise, CA/OR/WA. Gray whale, Eastern North Pacific. Humpback whale, Central America/Southern Mexico-CA/OR/WA. Humpback whale, Mainland Mexico-CA/OR/WA. Long-beaked common dolphin, CA. Minke whale, CA/OR/WA. Northern elephant seal, CA breeding. Northern right-whale dolphin, CA/OR/WA. Pacific white-sided dolphin, CA/OR/WA. Risso's dolphin, CA/OR/WA. Short-beaked common dolphin, CA/OR/WA. Short-finned pilot whale, CA/OR/WA. ¹ Sperm Whale, CA/OR/WA. ¹ California sea lion, U.S.
CA halibut/white seabass and other species set gillnet (>3.5 in mesh) *.	39	Gray whale, Eastern North Pacific. Harbor seal, CA. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. Long-beaked common dolphin, CA. Northern elephant seal, CA breeding. Southern sea otter, CA. Short-beaked common dolphin, CA/OR/WA. California sea lion, U.S.
CA yellowtail, barracuda, and white seabass drift gillnet (mesh size ≥3.5 in and <14 in) ² .	20	Long-beaked common dolphin, CA. Short-beaked common dolphin, CA/OR/WA.
AK Bristol Bay salmon drift gillnet ²	1,521	Beluga whale, Bristol Bay. Gray whale, Eastern North Pacific. Harbor seal, Bristol Bay. Northern fur seal, Eastern Pacific. Pacific white-sided dolphin, North Pacific. Spotted seal, Bering. Steller sea lion, Western U.S.
AK Bristol Bay salmon set gillnet ²	855	Beluga whale, Bristol Bay. Gray whale, Eastern North Pacific. Harbor seal, Bristol Bay. Northern fur seal, Eastern Pacific. Spotted seal, Bering.
AK Kodiak salmon set gillnet	128	Harbor porpoise, GOA. ¹ Harbor seal, GOA. Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Humpback whale, Western North Pacific. Northern sea otter, Southwest AK. Steller sea lion, Western U.S.
AK Cook Inlet salmon set gillnet ²	479	Beluga whale, Cook Inlet. Dall's porpoise, AK. Harbor porpoise, GOA. Harbor seal, Cook Inlet/Shelikof Strait. Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Northern sea otter, South central AK. Steller sea lion, Western U.S.
AK Cook Inlet salmon drift gillnet	355	Beluga whale, Cook Inlet. Dall's porpoise, AK. Harbor porpoise, GOA. ¹ Harbor seal, GOA. Steller sea lion, Western U.S.
AK Peninsula/Aleutian Islands salmon drift gillnet ²	148	Dall's porpoise, AK. Harbor porpoise, GOA. Harbor seal, GOA. Northern fur seal, Eastern Pacific.
AK Peninsula/Aleutian Islands salmon set gillnet ²	75	Harbor porpoise, Bering Sea. Northern sea otter, Southwest AK. Steller sea lion, Western U.S.
AK Prince William Sound salmon drift gillnet	483	Dall's porpoise, AK. Gray whale, Eastern North Pacific. Harbor porpoise, GOA. ¹

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
AK Yakutat salmon set gillnet	95	Harbor seal, Prince William Sound. Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Northern fur seal, Eastern Pacific. Pacific white-sided dolphin, North Pacific. Northern sea otter, South central AK. Steller sea lion, Western U.S. ¹ Gray whale, Eastern North Pacific. Harbor Porpoise, Yakutat/Southeast Alaska offshore waters. ¹ Harbor seal, Southeast AK. Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Dall's porpoise, CA/OR/WA. Harbor porpoise, inland WA. ¹ Harbor seal, WA inland.
WA Puget Sound Region salmon drift gillnet (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line-Treaty Indian fishing is excluded).	136	
<i>Trawl Fisheries:</i> AK Bering Sea, Aleutian Islands flatfish trawl	29	Bearded seal, Beringia. Gray whale, Eastern North Pacific. Harbor porpoise, Bering Sea. Harbor seal, Bristol Bay. Humpback whale, Western North Pacific. Killer whale, Eastern North Pacific Alaska resident. Killer whale, Eastern North Pacific GOA, AI, BS transient. ¹ Northern fur seal, Eastern Pacific. Ringed seal, Arctic. Ribbon seal. Spotted seal, Bering. Steller sea lion, Western U.S. ¹ Walrus, AK.
AK Bering Sea, Aleutian Islands pollock trawl	116	Bearded seal, Beringia. Harbor seal, Bristol Bay. Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Humpback whale, Western North Pacific. Pacific white-sided dolphin, North Pacific. Ribbon seal. Ringed seal, Arctic. Steller sea lion, Western U.S. ¹
<i>Pot, Ring Net, and Trap Fisheries:</i> CA coonstripe shrimp pot	9	Gray whale, Eastern North Pacific. Harbor seal, CA. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. Bottlenose dolphin, CA/OR/WA offshore. California sea lion, U.S. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. Gray whale, Eastern North Pacific. Southern sea otter, CA.
CA spiny lobster	189	Gray whale, Eastern North Pacific. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. Long-beaked common dolphin, CA. Gray whale, Eastern North Pacific. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA. ¹ Gray whale, Eastern North Pacific. Humpback whale, Central America/Southern Mexico-CA/OR/WA. ¹ Humpback whale, Mainland Mexico-CA/OR/WA.
CA spot prawn pot	22	
OR Dungeness crab pot	323	
WA/OR/CA sablefish pot	144	
WA coastal Dungeness crab pot	204	
<i>Longline/Set Line Fisheries:</i> AK Gulf of Alaska sablefish longline	177	Northern elephant seal, California breeding. Sperm whale, North Pacific. ¹ Steller sea lion, Eastern U.S. Steller sea lion, Western U.S. Bottlenose dolphin, HI Pelagic. False killer whale, HI Pelagic. ¹ Guadalupe fur seal. Risso's dolphin, HI. Striped dolphin, HI.
HI shallow-set longline * ^	14	False killer whale, American Samoa. Rough-toothed dolphin, American Samoa. Striped dolphin, unknown. None documented.
American Samoa longline ²	11	
HI shortline ²	8	
<i>Marine Aquaculture Fisheries:</i> HI offshore pen culture	1	Hawaiian monk seal.
Category III		
<i>Gillnet Fisheries:</i>		

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet	360	Harbor porpoise, Bering Sea.
AK Prince William Sound salmon set gillnet	25	Harbor seal, GOA.
		Northern sea otter, South central AK.
		Steller sea lion, Western U.S.
AK roe herring and food/bait herring gillnet	15	None documented.
CA herring set gillnet	11	None documented.
HI inshore gillnet	26	Bottlenose dolphin, HI.
		Spinner dolphin, HI.
WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing).	19	Harbor seal, OR/WA coast.
WA/OR Mainstem Columbia River eulachon gillnet	10	None documented.
WA/OR lower Columbia River (includes tributaries) drift net	244	California sea lion, U.S.
		Harbor seal, OR/WA coast.
WA Willapa Bay drift gillnet	57	Harbor seal, OR/WA coast.
		Northern elephant seal, CA breeding.
<i>Miscellaneous Net Fisheries:</i>		
AK Cook Inlet salmon purse seine	16	Humpback whale, Hawai'i.
		Humpback whale, Mexico-North Pacific.
AK Kodiak salmon purse seine	159	Dall's porpoise, AK.
		Harbor seal, North Kodiak.
		Humpback whale, Hawai'i.
		Humpback whale, Mexico-North Pacific.
		Humpback whale, Western North Pacific.
		Steller sea lion, Western U.S.
AK Southeast salmon purse seine	206	Humpback whale, Hawai'i.
		Humpback whale, Mexico-North Pacific.
AK roe herring and food/bait herring purse seine	31	None documented.
AK salmon beach seine	2	None documented.
AK salmon purse seine (Prince William Sound, Chignik, Alaska Peninsula).	298	Harbor seal, GOA.
WA/OR sardine purse seine	6	Harbor seal, Prince William Sound.
CA anchovy, mackerel, sardine purse seine	53	None documented.
		California sea lion, U.S.
CA squid purse seine	68	Harbor seal, CA.
		California sea lion, U.S.
		Long-beaked common dolphin, CA.
		Risso's dolphin, CA/OR/WA.
		Short-beaked common dolphin, CA/OR/WA.
CA tuna purse seine *	14	None documented.
WA/OR Lower Columbia River salmon seine	1	None documented.
WA/OR herring, anchovy, smelt, squid purse seine or lampara ...	41	None documented.
WA salmon seine	81	None documented.
WA salmon reef net	11	None documented.
HI lift net	14	None documented.
HI inshore purse seine	None recorded	None documented.
HI throw net, cast net	13	None documented.
HI seine net	17	None documented.
<i>Dip Net Fisheries:</i>		
CA squid dip net	19	None documented.
<i>Marine Aquaculture Fisheries:</i>		
CA marine shellfish aquaculture	unknown	None documented.
CA salmon enhancement rearing pen	>1	None documented.
CA white seabass enhancement net pens	13	California sea lion, U.S.
WA salmon net pens	14	California sea lion, U.S.
		Harbor seal, WA inland waters.
WA/OR shellfish aquaculture	23	None documented.
<i>Troll Fisheries:</i>		
WA/OR/CA albacore surface hook and line/troll	556	None documented.
CA halibut, white seabass, and yellowtail hook and line/handline	388	None documented.
CA/OR/WA non-albacore HMS hook and line	124	None documented.
AK Gulf of Alaska groundfish hand troll and dinglebar troll	4	None documented.
AK salmon troll	850	Steller sea lion, Eastern U.S.
		Steller sea lion, Western U.S.
American Samoa tuna troll	6	None documented.
CA/OR/WA salmon troll	1,030	None documented.
HI troll	1,124	Pantropical spotted dolphin, HI.
HI rod and reel	235	None documented.
Commonwealth of the Northern Mariana Islands tuna troll	9	None documented.
Guam tuna troll	450	None documented.
<i>Longline/Set Line Fisheries:</i>		
AK Bering Sea, Aleutian Islands Greenland turbot longline	4	Killer whale, GOA, AI, BS transient.
AK Bering Sea, Aleutian Islands Pacific cod longline	26	Northern fur seal, Eastern Pacific.
		Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands sablefish longline	8	None documented.
AK Bering Sea, Aleutian Islands halibut longline	84	Northern fur seal, Eastern Pacific.
		Sperm whale, North Pacific.
AK Gulf of Alaska halibut longline	689	Harbor seal, Clarence Strait.
		Harbor seal, Cook Inlet.
		Steller sea lion, Eastern U.S.
AK Gulf of Alaska Pacific cod longline	23	Harbor seal, Cook Inlet/Shelikof Strait.

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
AK octopus/squid longline	0	Steller sea lion, Western U.S. None documented.
AK state-managed waters longline/setline (including sablefish, rockfish, lingcod, and miscellaneous finfish).	464	None documented.
WA/OR/CA groundfish, bottomfish longline/set line	314	Bottlenose dolphin, CA/OR/WA offshore. California sea lion, U.S. Northern elephant seal, California breeding. Sperm whale, CA/OR/WA. Steller sea lion, Eastern U.S. None documented.
WA/OR/CA Pacific halibut longline	130	None documented in the most recent 5 years of data.
West Coast pelagic longline	4	None documented.
HI kaka line	17	None documented.
HI vertical line	6	None documented.
<i>Trawl Fisheries:</i>		
AK Bering Sea, Aleutian Islands Atka mackerel trawl	17	Harbor seal, Aleutian Islands. Northern elephant seal, California. Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands Pacific cod trawl	64	Bearded seal, AK. Ribbon seal. Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands rockfish trawl	22	Harbor seal, Aleutian Islands. Ribbon seal.
AK Gulf of Alaska flatfish trawl	16	Harbor seal, Cook Inlet/Shelikof Strait. Harbor seal, North Kodiak. Harbor seal, South Kodiak. Steller sea lion, Western U.S.
AK Gulf of Alaska Pacific cod trawl	12	Steller sea lion, Western U.S.
AK Gulf of Alaska pollock trawl	60	Steller sea lion, Western U.S.
AK Gulf of Alaska rockfish trawl	35	Steller sea lion, Western U.S.
AK Kodiak food/bait herring otter trawl	0	None documented.
AK shrimp otter trawl and beam trawl	12	None documented.
CA halibut bottom trawl	23	California sea lion, U.S. Harbor porpoise, unknown. Harbor seal, unknown. Northern elephant seal, CA breeding. Steller sea lion, unknown. California sea lion, U.S.
CA sea cucumber trawl	11	California sea lion, U.S.
WA/OR/CA shrimp trawl	130	California sea lion, U.S.
WA/OR/CA groundfish trawl	118	California sea lion, U.S. Dall's porpoise, CA/OR/WA. Harbor seal, OR/WA coast. Northern elephant seal, CA breeding. Northern fur seal, Eastern Pacific. Northern right whale dolphin, CA/OR/WA. Pacific white-sided dolphin, CA/OR/WA. Steller sea lion, Eastern U.S.
<i>Pot, Ring Net, and Trap Fisheries:</i>		
AK Bering Sea, Aleutian Islands Pacific cod pot	80	Harbor seal, Bristol Bay. Humpback whale, Hawai'i.
AK Bering Sea, Aleutian Islands sablefish pot	15	Humpback whale, Mexico-North Pacific. Humpback whale, Western North Pacific.
AK Bering Sea, Aleutian Islands crab pot	73	Sperm whale, North Pacific. Bowhead whale, Western Arctic. Gray whale, Eastern North Pacific.
AK Gulf of Alaska crab pot	86	None documented.
AK Gulf of Alaska Pacific cod pot	48	None documented in most recent 5 years of data.
AK Gulf of Alaska sablefish pot	129	None documented.
AK Southeast Alaska crab pot	375	Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Humpback whale, Hawai'i.
AK Southeast Alaska shrimp pot	104	Humpback whale, Mexico-North Pacific.
AK shrimp pot, except Southeast	77	None documented.
AK octopus/squid pot	0	None documented.
CA rock crab pot	113	Gray whale, Eastern North Pacific. Harbor seal, CA.
CA Tanner crab pot fishery	1	None documented.
WA/OR/CA hagfish pot	63	None documented.
WA/OR shrimp pot/trap	28	None documented.
WA Puget Sound Dungeness crab pot/trap	145	None documented.
HI crab trap	4	Humpback whale, Hawai'i.
HI fish trap	4	None documented.
HI lobster trap	Less than 3	None documented in recent years.
HI shrimp trap	3	None documented.
HI crab net	4	None documented.
HI Kona crab loop net	13	None documented.
<i>Hook and Line, Handline, and Jig Fisheries:</i>		
AK Bering Sea, Aleutian Islands groundfish jig	2	None documented.
AK Gulf of Alaska groundfish jig	68	None documented in most recent 5 years of data.
AK halibut jig	5	None documented.
American Samoa bottomfish	44	None documented.

TABLE 1—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
Commonwealth of the Northern Mariana Islands bottomfish	7	None documented.
Guam bottomfish	63	None documented.
HI aku boat, pole, and line	None recorded	None documented.
HI bottomfish handline	392	None documented in recent years.
HI inshore handline	158	None documented.
HI pelagic handline	271	None documented.
WA/OR/CA groundfish/finfish hook and line	689	California sea lion, U.S.
Western Pacific squid jig	0	None documented.
<i>Harpoon Fisheries:</i>		
CA swordfish harpoon	21	None documented.
<i>Pound Net/Weir Fisheries:</i>		
AK herring spawn on kelp pound net	143	None documented.
AK Southeast herring roe/food/bait pound net	1	None documented.
HI bullpen trap	<3	None documented.
<i>Bait Pens:</i>		
WA/OR/CA bait pens	13	California sea lion, U.S.
<i>Dredge Fisheries:</i>		
AK scallop dredge	108 (5 AK)	None documented.
<i>Dive, Hand/Mechanical Collection Fisheries:</i>		
AK clam	57	None documented.
AK miscellaneous invertebrates handpick	188	None documented.
CA/OR/WA dive collection	186	None documented.
CA/WA kelp, seaweed and algae	4	None documented.
HI black coral diving	None recorded	None documented.
HI fish pond	None recorded	None documented.
HI handpick	25	None documented.
HI lobster diving	12	None documented.
HI spearfishing	67	None documented.
WA/OR/CA hand/mechanical collection	320	None documented.
<i>Commercial Passenger Fishing Vessel (Charter Boat) Fisheries:</i>		
AK/WA/OR/CA commercial passenger fishing vessel	>7,000 (1,006 AK)	Humpback whale, Hawai'i. Humpback whale, Mexico-North Pacific. Humpback whale, Western North Pacific. Killer whale, unknown. Steller sea lion, Eastern U.S. Steller sea lion, Western U.S.
<i>Live Finfish/Shellfish Fisheries:</i>		
CA nearshore finfish trap	42	None documented.
HI aquarium collecting	None recorded	None documented.

List of Abbreviations and Symbols Used in Table 1:

AI—Aleutian Islands; AK—Alaska; BS—Bering Sea; CA—California; ENP—Eastern North Pacific; GOA—Gulf of Alaska; HI—Hawaii; MHI—Main Hawaiian Islands; OR—Oregon; WA—Washington;

¹ Fishery classified based on mortalities and serious injuries of this stock, which are greater than or equal to 50 percent (Category I) or greater than 1 percent and less than 50 percent (Category II) of the stock's PBR;

² Fishery classified by analogy;

* Fishery has an associated high seas component listed in table 3; and

^ The list of marine mammal species and/or stocks killed or injured in this fishery is identical to the list of species and/or stocks killed or injured in high seas component of the fishery, minus species and/or stocks that have geographic ranges exclusively on the high seas. The species and/or stocks are found, and the fishery remains the same, on both sides of the EEZ boundary. Therefore, the EEZ components of these fisheries pose the same risk to marine mammals as the components operating on the high seas.

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
Category I		
<i>Gillnet Fisheries:</i>		
Mid-Atlantic gillnet	4,020	Bottlenose dolphin, Northern Migratory coastal. Bottlenose dolphin, Southern Migratory coastal. ¹ Bottlenose dolphin, Northern NC estuarine system. ¹ Bottlenose dolphin, Southern NC estuarine system. ¹ Bottlenose dolphin, WNA offshore. Common dolphin, WNA. Gray seal, WNA. Harbor porpoise, GME/BF. Harbor seal, WNA. Harp seal, WNA. Hooded seal, WNA. Humpback whale, Gulf of Maine. Minke whale, Canadian east coast.
Northeast sink gillnet	4,924	Bottlenose dolphin, Northern Migratory coastal. Bottlenose dolphin, WNA offshore. Common dolphin, WNA. Fin whale, WNA. Gray seal, WNA. ¹ Harbor porpoise, GME/BF. Harbor seal, WNA.

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
<i>Trap/Pot Fisheries:</i> Northeast/Mid-Atlantic American lobster and Jonah crab trap/pot	8,485	Harp seal, WNA. Humpback whale, Gulf of Maine. Minke whale, Canadian east coast. North Atlantic right whale, WNA. Risso's dolphin, WNA. White-sided dolphin, WNA. Humpback whale, Gulf of Maine. Minke whale, Canadian east coast. North Atlantic right whale, WNA. ¹
<i>Longline Fisheries:</i> Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline*.	201	Atlantic spotted dolphin, Northern GMX. Bottlenose dolphin, Northern GMX oceanic. Bottlenose dolphin, WNA offshore. Common dolphin, WNA. Cuvier's beaked whale, WNA. False killer whale, WNA. Harbor porpoise, GME, BF. Kogia spp. (Pygmy or dwarf sperm whale), WNA. Long-finned pilot whale, WNA. Mesoplodon beaked whale, WNA. Minke whale, Canadian East coast. Pantropical spotted dolphin, Northern GMX. Pygmy sperm whale, GMX. Risso's dolphin, Northern GMX. Risso's dolphin, WNA. Rough-toothed dolphin, Northern GMX. Short-finned pilot whale, Northern GMX. Short-finned pilot whale, WNA. ¹ Sperm whale, Northern GMX.
Category II		
<i>Gillnet Fisheries:</i> Chesapeake Bay inshore gillnet ²	265	Bottlenose dolphin, unknown (Northern migratory coastal or Southern migratory coastal).
Gulf of Mexico gillnet ²	248	Bottlenose dolphin, Eastern GMX coastal. Bottlenose dolphin, GMX bay, sound, and estuarine. Bottlenose dolphin, Mobile Bay, Bonsecour Bay. Bottlenose dolphin, MS Sound, Lake Borgne, Bay Boudreau. Bottlenose dolphin, Northern GMX coastal. Bottlenose dolphin, Western GMX coastal.
NC inshore gillnet	1,157	Bottlenose dolphin, Northern NC estuarine system. ¹ Bottlenose dolphin, Southern NC estuarine system. ¹
Northeast drift gillnet ²	1,036	None documented.
Southeast Atlantic gillnet ²	273	Bottlenose dolphin, Central FL coastal. Bottlenose dolphin, Northern FL coastal.
Southeastern U.S. Atlantic shark gillnet	21	Bottlenose dolphin, unknown (Central FL, Northern FL, SC/GA coastal, or Southern migratory coastal). North Atlantic right whale, WNA.
<i>Trawl Fisheries:</i> Mid-Atlantic mid-water trawl (including pair trawl)	320	Bottlenose dolphin, WNA offshore. Harbor seal, WNA.
Mid-Atlantic bottom trawl	633	Bottlenose dolphin, WNA offshore. ¹ Common dolphin, WNA. ¹ Gray seal, WNA. ¹ Harbor seal, WNA. Risso's dolphin, WNA. ¹ White-sided dolphin, WNA.
Northeast mid-water trawl (including pair trawl)	542	Common dolphin, WNA. Gray seal, WNA. Harbor seal, WNA. Long-finned pilot whale, WNA. White-sided dolphin, WNA.
Northeast bottom trawl	968	Bottlenose dolphin, WNA offshore. ¹ Common dolphin, WNA. Gray seal, WNA. ¹ Harbor porpoise, GME/BF. Harbor seal, WNA. Harp seal, WNA. Long-finned pilot whale, WNA. ¹ Risso's dolphin, WNA. ¹ White-sided dolphin, WNA. ¹
Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl	10,824	Atlantic spotted dolphin, Northern Gulf of Mexico. Bottlenose dolphin, Barataria Bay Estuarine System. Bottlenose dolphin, Eastern GMX coastal. ¹ Bottlenose dolphin, GMX bay, sound, estuarine. ¹

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
Virginia shrimp trawl	12	Bottlenose dolphin, GMX continental shelf. Bottlenose dolphin, Mississippi River Delta. Bottlenose dolphin, Mobile Bay, Bonsecour Bay. Bottlenose dolphin, Northern GMX coastal. ¹ Bottlenose dolphin, Pensacola Bay, East Bay. Bottlenose dolphin, Perdido Bay. Bottlenose dolphin, SC/GA coastal. ¹ Bottlenose dolphin, Southern migratory coastal. Bottlenose dolphin, Western GMX coastal. ¹ None documented.
<i>Trap/Pot Fisheries:</i>		
MA mixed species trap/pot	1,240	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot ²	1,101	Bottlenose dolphin, Biscayne Bay estuarine. Bottlenose dolphin, Central FL coastal. Bottlenose dolphin, Eastern GMX coastal. Bottlenose dolphin, FL Bay. Bottlenose dolphin, GMX bay, sound, estuarine (FL west coast portion). Bottlenose dolphin, Indian River Lagoon estuarine system. Bottlenose dolphin, Jacksonville estuarine system. Bottlenose dolphin, Sarasota Bay, Little Sarasota Bay. Fin whale, WNA. Humpback whale, Gulf of Maine.
Atlantic mixed species trap/pot ²	3,493	Bottlenose dolphin, Biscayne Bay estuarine. Bottlenose dolphin, Central FL coastal. Bottlenose dolphin, Central GA estuarine system. ¹ Bottlenose dolphin, Charleston estuarine system. ¹ Bottlenose dolphin, Indian River Lagoon estuarine system. Bottlenose dolphin, Jacksonville estuarine system. Bottlenose dolphin, Northern FL coastal. ¹ Bottlenose dolphin, Northern GA/Southern SC estuarine system. Bottlenose dolphin, Northern Migratory coastal. Bottlenose dolphin, Northern NC estuarine system. ¹ Bottlenose dolphin, Northern SC estuarine system. Bottlenose dolphin, SC/GA coastal. Bottlenose dolphin, Southern GA estuarine system. Bottlenose dolphin, Southern Migratory coastal. ¹ Bottlenose dolphin, Southern NC estuarine system. West Indian manatee, FL.
Atlantic blue crab trap/pot	6,679	
<i>Purse Seine Fisheries:</i>		
Gulf of Mexico menhaden purse seine	40–42	Bottlenose dolphin, GMX bay, sound, estuarine. Bottlenose dolphin, Mississippi River Delta. Bottlenose dolphin, Mississippi Sound, Lake Borgne, Bay Boudreau. Bottlenose dolphin, Northern GMX coastal. ¹ Bottlenose dolphin, Western GMX coastal. ¹
Mid-Atlantic menhaden purse seine ²	17	Bottlenose dolphin, Northern Migratory coastal. Bottlenose dolphin, Southern Migratory coastal.
<i>Haul/Beach Seine Fisheries:</i>		
Mid-Atlantic haul/beach seine	359	Bottlenose dolphin, Northern Migratory coastal. ¹ Bottlenose dolphin, Northern NC estuarine system. ¹ Bottlenose dolphin, Southern Migratory coastal. ¹
NC long haul seine	10	Bottlenose dolphin, Northern NC estuarine system. ¹ Bottlenose dolphin, Southern NC estuarine system.
<i>Stop Seine/Weir/Pound Net:</i>		
U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net).	unknown	Bottlenose dolphin, Northern NC estuarine system.
<i>Stop Net Fisheries:</i>		
NC roe mullet stop net	1	Bottlenose dolphin, Northern NC estuarine system. Bottlenose dolphin, unknown (Southern migratory coastal or Southern NC estuarine system).
<i>Pound Net Fisheries:</i>		
VA pound net	20	Bottlenose dolphin, Northern migratory coastal. Bottlenose dolphin, Northern NC estuarine system. Bottlenose dolphin, Southern Migratory coastal. ¹
Category III		
<i>Gillnet Fisheries:</i>		
Caribbean gillnet	127	None documented in the most recent 5 years of data.
DE River inshore gillnet	unknown	None documented in the most recent 5 years of data.
Long Island Sound inshore gillnet	unknown	None documented in the most recent 5 years of data.
RI, southern MA (to Monomoy Island), and NY Bight (Raritan and Lower NY Bays) inshore gillnet.	unknown	None documented in the most recent 5 years of data.
Southeast Atlantic inshore gillnet	unknown	Bottlenose dolphin, Northern SC estuarine system.
<i>Trawl Fisheries:</i>		
Atlantic shellfish bottom trawl	>58	None documented.
Gulf of Mexico butterfish trawl	2	Bottlenose dolphin, Northern GMX oceanic. Bottlenose dolphin, Northern GMX continental shelf.

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
Gulf of Mexico mixed species trawl	20	None documented.
GA cannonball jellyfish trawl	1	Bottlenose dolphin, SC/GA coastal.
<i>Marine Aquaculture Fisheries:</i>		
Finfish aquaculture	48	Harbor seal, WNA.
Shellfish aquaculture	unknown	None documented.
<i>Purse Seine Fisheries:</i>		
Gulf of Maine Atlantic herring purse seine	>7	Harbor seal, WNA.
Gulf of Maine menhaden purse seine	>2	None documented.
FL West Coast sardine purse seine	10	None documented.
U.S. Atlantic tuna purse seine *	5	None documented in most recent 5 years of data.
<i>Longline/Hook and Line Fisheries:</i>		
Northeast/Mid-Atlantic bottom longline/hook-and-line	>1,207	None documented.
Gulf of Maine, U.S. Mid-Atlantic tuna, shark, swordfish hook-and-line/harpoon.	2,846	Humpback whale, Gulf of Maine.
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean snapper-grouper and other reef fish bottom longline/hook-and-line.	>5,000	Bottlenose dolphin, GMX continental shelf.
Southeastern U.S. Atlantic, Gulf of Mexico shark bottom longline/hook-and-line.	39	Bottlenose dolphin, Eastern GMX coastal.
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean pelagic hook-and-line/harpoon.	680	Bottlenose dolphin, Northern GMX continental shelf.
U.S. Atlantic, Gulf of Mexico trotline	unknown	None documented.
<i>Trap/Pot Fisheries:</i>		
Caribbean mixed species trap/pot	154	Bottlenose dolphin, Puerto Rico and United States Virgin Islands.
Caribbean spiny lobster trap/pot	40	None documented.
FL spiny lobster trap/pot	1,268	Bottlenose dolphin, Biscayne Bay estuarine.
		Bottlenose dolphin, Central FL coastal.
		Bottlenose dolphin, Eastern GMX coastal.
		Bottlenose dolphin, FL Bay.
		Bottlenose dolphin, FL Keys.
Gulf of Mexico blue crab trap/pot	4,113	Bottlenose dolphin, Barataria Bay.
		Bottlenose dolphin, Caloosahatchee River.
		Bottlenose dolphin, Eastern GMX coastal.
		Bottlenose dolphin, GMX bay, sound, estuarine.
		Bottlenose dolphin, Mississippi Sound, Lake Borgne, Bay Boudreau.
		Bottlenose dolphin, Mobile Bay, Bonsecour Bay.
		Bottlenose dolphin, Northern GMX coastal.
		Bottlenose dolphin, Waccasassa Bay, Withlacoochee Bay, Crystal Bay.
		Bottlenose dolphin, Western GMX coastal.
		West Indian manatee, FL.
Gulf of Mexico mixed species trap/pot	unknown	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico golden crab trap/pot	10	None documented.
U.S. Mid-Atlantic eel trap/pot	unknown	None documented.
<i>Stop Seine/Weir/Pound Net/Floating Trap/Fyke Net Fisheries:</i>		
Gulf of Maine herring and Atlantic mackerel stop seine/weir	>1	Harbor porpoise, GME/BF.
		Harbor seal, WNA.
		Minke whale, Canadian east coast.
		Atlantic white-sided dolphin, WNA.
U.S. Mid-Atlantic crab stop seine/weir	2,600	None documented.
RI floating trap	9	None documented.
Northeast and Mid-Atlantic fyke net	unknown	None documented.
<i>Dredge Fisheries:</i>		
Gulf of Maine sea urchin dredge	unknown	None documented.
Gulf of Maine mussel dredge	unknown	None documented.
Gulf of Maine, U.S. Mid-Atlantic sea scallop dredge	>403	None documented.
Mid-Atlantic blue crab dredge	unknown	None documented.
Mid-Atlantic soft-shell clam dredge	unknown	None documented.
Mid-Atlantic whelk dredge	unknown	None documented.
U.S. Mid-Atlantic/Gulf of Mexico oyster dredge	7,000	None documented.
New England and Mid-Atlantic offshore surf clam/quahog dredge	unknown	None documented.
<i>Haul/Beach Seine Fisheries:</i>		
Caribbean haul/beach seine	38	West Indian manatee, Puerto Rico.
Gulf of Mexico haul/beach seine	unknown	None documented.
Southeastern U.S. Atlantic haul/beach seine	25	None documented.
<i>Dive, Hand/Mechanical Collection Fisheries:</i>		
Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection.	20,000	None documented.
Gulf of Maine urchin dive, hand/mechanical collection	unknown	None documented.
Gulf of Mexico, Southeast Atlantic, Mid-Atlantic, and Caribbean cast net.	unknown	None documented.
<i>Commercial Passenger Fishing Vessel (Charter Boat) Fisheries:</i>		
Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel.	4,000	Bottlenose dolphin, Barataria Bay estuarine system.
		Bottlenose dolphin, Biscayne Bay estuarine.
		Bottlenose dolphin, Central FL coastal.
		Bottlenose dolphin, Charleston estuarine system.
		Bottlenose dolphin, Choctawhatchee Bay.

TABLE 2—LIST OF FISHERIES—COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and/or stocks incidentally killed or injured
		Bottlenose dolphin, Eastern GMX coastal. Bottlenose dolphin, FL Bay. Bottlenose dolphin, GMX bay, sound, estuarine. Bottlenose dolphin, Indian River Lagoon estuarine system. Bottlenose dolphin, Jacksonville estuarine system. Bottlenose dolphin, Mississippi Sound, Lake Borgne, Bay Boudreau. Bottlenose dolphin, Northern FL coastal. Bottlenose dolphin, Northern GA/Southern SC estuarine. Bottlenose dolphin, Northern GMX coastal. Bottlenose dolphin, Northern migratory coastal. Bottlenose dolphin, Northern NC estuarine. Bottlenose dolphin, Southern migratory coastal. Bottlenose dolphin, Southern NC estuarine system. Bottlenose dolphin, SC/GA coastal. Bottlenose dolphin, Western GMX coastal. Short-finned pilot whale, WNA.

List of Abbreviations and Symbols Used in Table 2:

DE—Delaware; FL—Florida; GA—Georgia; GME/BF—Gulf of Maine/Bay of Fundy; GMX—Gulf of Mexico; MA—Massachusetts; NC—North Carolina; NY—New York; RI—Rhode Island; SC—South Carolina; VA—Virginia; WNA—Western North Atlantic;

¹ Fishery classified based on mortalities and serious injuries of this stock, which are greater than or equal to 50 percent (Category I) or greater than 1 percent and less than 50 percent (Category II) of the stock's PBR;² Fishery classified by analogy; and

* Fishery has an associated high seas component listed in table 3.

TABLE 3—LIST OF FISHERIES—COMMERCIAL FISHERIES ON THE HIGH SEAS

Fishery description	Number of HSFCA permits	Marine mammal species and/or stocks incidentally killed or injured
Category I		
<i>Longline Fisheries:</i>		
Atlantic Highly Migratory Species *	30	Atlantic spotted dolphin, WNA. Bottlenose dolphin, Northern GMX oceanic. Bottlenose dolphin, WNA offshore. Common dolphin, WNA. Cuvier's beaked whale, WNA. False killer whale, WNA. Killer whale, GMX oceanic. Kogia spp. whale (Pygmy or dwarf sperm whale), WNA. Long-finned pilot whale, WNA. Mesoplodon beaked whale, WNA. Minke whale, Canadian East coast. Pantropical spotted dolphin, WNA. Risso's dolphin, GMX. Risso's dolphin, WNA. Short-finned pilot whale, WNA.
Western Pacific Pelagic (HI Deep-set component) * ^	146	Bottlenose dolphin, HI Pelagic. False killer whale, HI Pelagic. Kogia spp. (Pygmy or dwarf sperm whale), HI. Risso's dolphin, HI. Rough-toothed dolphin, HI. Short-finned pilot whale, HI.
Category II		
<i>Drift Gillnet Fisheries:</i>		
Pacific Highly Migratory Species * ^	2	Long-beaked common dolphin, CA. Humpback whale, CA/OR/WA. Northern right-whale dolphin, CA/OR/WA. Pacific white-sided dolphin, CA/OR/WA. Risso's dolphin, CA/OR/WA. Short-beaked common dolphin, CA/OR/WA.
<i>Trawl Fisheries:</i>		
CCAMLR	0	Antarctic fur seal.
<i>Purse Seine Fisheries:</i>		
Western and Central Pacific Ocean Tuna Purse Seine	14	Bottlenose dolphin, unknown. Blue whale, unknown. Bryde's whale, unknown. False killer whale, unknown. Fin whale, unknown. Indo-Pacific dolphin. Long-beaked common dolphin, unknown. Melon-headed whale, unknown. Minke whale, unknown. Pantropical spotted dolphin, unknown. Risso's dolphin, unknown.

TABLE 3—LIST OF FISHERIES—COMMERCIAL FISHERIES ON THE HIGH SEAS—Continued

Fishery description	Number of HSFCA permits	Marine mammal species and/or stocks incidentally killed or injured
Western Pacific Pelagic	0	Rough-toothed dolphin, unknown. Sei whale, unknown. Short-finned pilot whale, unknown. Sperm whale, unknown. Spinner dolphin, unknown. No information.
<i>Longline Fisheries:</i>		
CCAMLR	0	None documented.
South Pacific Albacore Troll	6	No information.
Western Pacific Pelagic (HI Shallow-set component)* ^	14	Bottlenose dolphin, HI Pelagic. False killer whale, HI Pelagic. Guadalupe fur seal. Risso's dolphin, HI. Striped dolphin, HI.
<i>Handline/Pole and Line Fisheries:</i>		
Atlantic Highly Migratory Species	0	No information.
Pacific Highly Migratory Species	36	No information.
South Pacific Albacore Troll	1	No information.
Western Pacific Pelagic	1	No information.
<i>Troll Fisheries:</i>		
Atlantic Highly Migratory Species	0	No information.
South Pacific Albacore Troll	23	No information.
Western Pacific Pelagic	6	No information.
Category III		
<i>Longline Fisheries:</i>		
Northwest Atlantic Bottom Longline	1	None documented.
Pacific Highly Migratory Species	119	None documented in the most recent 5 years of data.
<i>Purse Seine Fisheries:</i>		
Pacific Highly Migratory Species* ^	1	None documented.
<i>Trawl Fisheries:</i>		
Northwest Atlantic	1	None documented.
<i>Troll Fisheries:</i>		
Pacific Highly Migratory Species*	95	None documented.

List of Terms, Abbreviations, and Symbols Used in Table 3:

CA—California; GMX—Gulf of Mexico; HI—Hawaii; OR—Oregon; WA—Washington; WNA—Western North Atlantic;

* Fishery is an extension/component of an existing fishery operating within U.S. waters listed in table 1 or 2. The number of permits listed in table 3 represents only the number of permits for the high seas component of the fishery; and

^ The list of marine mammal species and/or stocks killed or injured in this fishery is identical to the list of marine mammal species and/or stocks killed or injured in U.S. waters component of the fishery, minus species and/or stocks that have geographic ranges exclusively in coastal waters, because the marine mammal species and/or stocks are also found on the high seas and the fishery remains the same on both sides of the EEZ boundary. Therefore, the high seas components of these fisheries pose the same risk to marine mammals as the components of these fisheries operating in U.S. waters.

TABLE 4—FISHERIES AFFECTED BY TAKE REDUCTION TEAMS AND PLANS

Take reduction plans	Affected fisheries
Atlantic Large Whale Take Reduction Plan (ALWTRP)—50 CFR 229.32	<i>Category I:</i> Mid-Atlantic gillnet. Northeast/Mid-Atlantic American lobster and Jonah crab trap/pot. Northeast sink gillnet. <i>Category II:</i> Atlantic blue crab trap/pot. Atlantic mixed species trap/pot. MA mixed species trap/pot. Northeast drift gillnet. Southeast Atlantic gillnet. Southeastern U.S. Atlantic shark gillnet.* Southeastern, U.S. Atlantic, Gulf of Mexico stone crab trap/pot.^
Bottlenose Dolphin Take Reduction Plan (BDTRP)—50 CFR 229.35	<i>Category I:</i> Mid-Atlantic gillnet.

TABLE 4—FISHERIES AFFECTED BY TAKE REDUCTION TEAMS AND PLANS—Continued

Take reduction plans	Affected fisheries
	<i>Category II:</i> Atlantic blue crab trap/pot. Chesapeake Bay inshore gillnet fishery. Mid-Atlantic haul/beach seine. Mid-Atlantic menhaden purse seine. NC inshore gillnet. NC long haul seine. NC roe mullet stop net. Southeast Atlantic gillnet. Southeastern U.S. Atlantic shark gillnet. Southeastern U.S. Atlantic, Gulf of Mexico shrimp trawl.^ Southeastern, U.S. Atlantic, Gulf of Mexico stone crab trap/pot.^ U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the NC roe mullet stop net). VA pound net.
False Killer Whale Take Reduction Plan (FKWTRP)—50 CFR 229.37 ..	<i>Category I:</i> HI deep-set longline.
	<i>Category II:</i> HI shallow-set longline.
Harbor Porpoise Take Reduction Plan (HPTRP)—50 CFR 229.33 (New England) and 229.34 (Mid-Atlantic).	<i>Category I:</i> Mid-Atlantic gillnet. Northeast sink gillnet.
Pelagic Longline Take Reduction Plan (PLTRP)—50 CFR 229.36	<i>Category I:</i> Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline.
Pacific Offshore Cetacean Take Reduction Plan (POCTRP)—50 CFR 229.31.	<i>Category II:</i> CA thresher shark/swordfish drift gillnet (≥14 in mesh).
Atlantic Trawl Gear Take Reduction Team (ATGTRT)	<i>Category II:</i> Mid-Atlantic bottom trawl. Mid-Atlantic mid-water trawl (including pair trawl). Northeast bottom trawl. Northeast mid-water trawl (including pair trawl).

List of Symbols Used in Table 4:

* Only applicable to the portion of the fishery operating in U.S. waters; and

^ Only applicable to the portion of the fishery operating in the Atlantic Ocean.

Classification

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule would not have a significant economic impact on a substantial number of small entities. Any entity with combined annual fishery landing receipts less than \$11 million is considered a small entity for purposes of the Regulatory Flexibility Act. Under the size standard, all entities subject to this action were considered small entities; thus, they all would continue to be considered small under the new standards.

Under existing regulations, all individuals participating in Category I or II fisheries must register under the MMPA and obtain an authorization certificate. The authorization certificate authorizes the taking of marine mammals incidental to commercial fishing operations under the MMPA. Additionally, individuals may be subject to a TRP and requested to carry an observer. NMFS has estimated that up to approximately 49,014 fishing vessels, most with annual revenues below the SBA's small entity thresholds,

may operate in Category I or II fisheries. As fishing vessels operating in Category I or II fisheries, they are required to register with NMFS. The MMPA registration process is integrated with existing state and Federal licensing, permitting, and registration programs. Therefore, individuals who have a state or Federal fishing permit or landing license, or who are authorized through another related state or Federal fishery registration program, are currently not required to register separately under the MMPA or pay the \$25 registration fee. Through this integrated process, registration under the MMPA, including the \$25 registration fee, is only required for vessels participating in a Category I or II non-permitted fishery. All Category I and II fisheries listed on the 2024 proposed LOF are permitted through state or Federal processes, and registration under the MMPA is covered through the integrated process. Therefore, this proposed rule would not impose any direct costs on small entities.

The MMPA requires any vessel owner or operator participating in a fishery listed on the LOF to report to NMFS, within 48 hours of the end of the fishing trip, all marine mammal incidental

mortalities and injuries that occur during commercial fishing operations. These marine mammal mortalities and injuries are reported using a postage-paid, Office of Management and Budget (OMB) approved form (OMB Control Number 0648-0292). This postage-paid form requires less than 15 minutes to complete and can be dropped in any mailbox, faxed, emailed, or completed online within 48 hours of the vessel's return to port. Therefore, recordkeeping and reporting costs associated with this LOF are minimal and would not have a significant impact on a substantial number of small entities.

If a vessel is requested to carry an observer, vessels will not incur any direct economic costs associated with carrying that observer. As a result of this certification, an initial regulatory flexibility analysis is not required and none has been prepared. In the event that reclassification of a fishery to Category I or II results in a TRP, economic analyses of the effects of that TRP would be summarized in subsequent rulemaking actions.

This proposed rule contains existing collection-of-information (COI) requirements subject to the Paperwork Reduction Act and would not impose

additional or new COI requirements. The COI for the registration of individuals under the MMPA has been approved by the OMB under OMB Control Number 0648–0293 (0.15 hours per report for new registrants). The requirement for reporting marine mammal mortalities or injuries has been approved by OMB under OMB Control Number 0648–0292 (0.15 hours per report). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the COI. Send comments regarding these reporting burden estimates or any other aspect of the COI, including suggestions for reducing burden, to NMFS (see **ADDRESSES**). You may also submit comments on these or any other aspects of the collection of information at <https://www.reginfo.gov/public/do/PRAMain>.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with a COI, subject to the requirements of the Paperwork Reduction Act, unless that COI displays a currently valid OMB control number.

This proposed rule has been determined to be not significant for the purposes of Executive Orders 12866 and 13563.

In accordance with the Companion Manual for NOAA Administrative Order (NAO) 216–6A, NMFS determined that publishing this proposed LOF qualifies to be categorically excluded from further NEPA review, consistent with categories of activities identified in Categorical Exclusion G7 (“Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either

collectively or on a case-by-case basis”) of the Companion Manual and we have not identified any extraordinary circumstances listed in Chapter 4 of the Companion Manual for NAO 216–6A that would preclude application of this categorical exclusion. If NMFS takes a management action, for example, through the development of a TRP, NMFS would first prepare an Environmental Impact Statement or Environmental Assessment, as required under NEPA, specific to that action.

This proposed rule would not affect species listed as threatened or endangered under the ESA or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this proposed rule will not affect the conclusions of those opinions. The classification of fisheries on the LOF is not considered to be a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, through the development of a TRP, NMFS would consult under ESA section 7 on that action.

This proposed rule would have no adverse impacts on marine mammals and may have a positive impact on marine mammals by improving knowledge of marine mammals and the fisheries interacting with marine mammals through information collected from observer programs, stranding and sighting data, or take reduction teams.

This proposed rule would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

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Dated: September 7, 2023.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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Notices

Federal Register

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Background Investigator Quality Control Survey

AGENCY: Agency for International Development (USAID).

ACTION: Availability of survey.

SUMMARY: Quality control survey to allow the USAID Office of Security Field Investigations program to obtain feedback on its background investigator workforce from members of the general public who are interviewed by USAID background investigators.

DATES: Comments are due within 60 days after date of publication in the *Federal Register*.

ADDRESSES: USAID, SEC/FI, 1300 Pennsylvania Ave. NW, 4th Floor, Washington, DC 20523.

FOR FURTHER INFORMATION CONTACT: Brian Shemonsky, (202) 712-1734, bshemonsky@usaid.gov.

SUPPLEMENTARY INFORMATION: USAID currently conducts this quality control process via U.S. Mail and telephone calls. The agency is seeking to both modernize and simplify this process.

Brian Shemonsky,

Background Investigations Program Manager.

[FR Doc. 2023-19694 Filed 9-12-23; 8:45 am]

BILLING CODE 6116-01-P

DEPARTMENT OF COMMERCE

International Trade Administration

[C-570-011]

Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that countervailable subsidies were provided to certain producers/exporters of certain crystalline silicon photovoltaic products from the People's Republic of China (China) during the period of review January 1, 2021, through December 31, 2021.

DATES: Applicable September 13, 2023.

FOR FURTHER INFORMATION CONTACT: Gene H. Calvert, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482-3586.

SUPPLEMENTARY INFORMATION:

Background

On March 8, 2023, Commerce published the *Preliminary Results* of this administrative review in the *Federal Register*.¹ For a description of the events that occurred since the *Preliminary Results*, see the Issues and Decision Memorandum.²

Scope of the Order³

The merchandise covered by the *Order* are modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of the *Order*, subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells produced in a

¹ See *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2021*, 88 FR 14331 (March 8, 2023) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM).

² See Memorandum, "Issues and Decision Memorandum for the Final Results of the Administrative Review of the Countervailing Duty Order on Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China; 2021," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

³ See *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 FR 8592 (February 18, 2015) (*Order*). On July 3, 2023, the scope of the *Order* was amended. See *Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Results of Changed Circumstances Reviews, and Intent to Revoke the Antidumping and Countervailing Duty Orders, in Part*, 88 FR 42686.

customs territory other than China. A full description of the scope of the *Order* is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by interested parties in their case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of topics discussed in the Issues and Decision Memorandum is provided as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Changes Since the Preliminary Results

Based on our analysis of comments submitted by interested parties and the evidence on the record, Commerce revised the calculation for the net countervailable subsidy rates for the sole company respondent in this review, Trina Solar (Changzhou) Science & Technology Co., Ltd. (Trina Solar). For a discussion of the issues, see the Issues and Decision Memorandum.

Methodology

Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, we find that there is a subsidy, *i.e.*, a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.⁴ For a complete description of the methodology underlying all of Commerce's conclusions, including our reliance, in part, on facts otherwise available, including adverse facts available, pursuant to sections 776(a) and (b) of the Act, see the Issues and Decision Memorandum.

⁴ See sections 771(5)(B) and (D) of the Act regarding financial contribution, section 771(5)(E) of the Act regarding benefit, and section 771(5A) of the Act regarding specificity.

Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(5), Commerce calculated a countervailable subsidy rate for Trina Solar as identified below. Because there are no other producers or exporters subject to this review, Commerce does not need to establish a rate for such companies in this review. Commerce determines the net countervailable subsidy rate for the period January 1, 2021, through December 31, 2021, is as follows:

Producer/exporter	Subsidy rate (percent <i>ad valorem</i>)
Trina Solar (Changzhou) Science & Technology Co., Ltd. ⁵	13.21

Disclosure

Commerce intends to disclose calculations and analysis performed for the final results of this administrative review within five days after the publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce intends to instruct U.S. Customs and Border Protection (CBP) to collect cash deposits of estimated countervailing duties in the amount referenced above for Trina Solar with regard to shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results in the **Federal Register**. These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

Assessment Requirements

In accordance with section 751(a)(2)(C) of the Act and 19 CFR

351.212(b)(2), Commerce has determined, and CBP shall assess, countervailing duties on all appropriate entries covered by this review, for Trina Solar at the applicable *ad valorem* assessment rate listed. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the publication of the final results of this administrative review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protection order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: September 5, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix**List of Topics Discussed in the Issues and Decision Memorandum**

- I. Summary
- II. Background
- III. Scope of the *Order*
- IV. Use of Facts Available and Application of Adverse Inferences
- V. Changes Since the *Preliminary Results*
- VI. Subsidies Valuation Information
- VII. Analysis of Programs
- VIII. Discussion of the Issues

Comment 1: Whether the Provision of Certain Inputs for Less-Than-Adequate-Remuneration (LTAR) Programs is Countervailable

Comment 2: Whether Commerce Should Find the Provision of Electricity for LTAR Program is Countervailable

Comment 3: Whether Commerce Should Apply Adverse Facts Available to "Other Subsidies" Reported by Trina Solar

Comment 4: The Benchmark for Aluminum Extrusions for LTAR

Comment 5: The Benchmark for Ocean Freight

Comment 6: The Benchmark for Domestic Inland Freight

Comment 7: Whether Certain Trina Solar Affiliates Were Uncreditworthy

Comment 8: Whether Commerce Should Revise the Denominator for Export-Oriented Subsidies

Comment 9: Whether Commerce Should Revise the Benchmark for International Ocean Shipping Services for LTAR

IX. Recommendation

[FR Doc. 2023–19739 Filed 9–12–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE**International Trade Administration**

[A–533–912]

Certain Non-Refillable Steel Cylinders From India: Postponement of Preliminary Determination in the Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 13, 2023.

FOR FURTHER INFORMATION CONTACT: Benito Ballesteros or Samuel Evans, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7425 or (202) 482–2420, respectively.

SUPPLEMENTARY INFORMATION:**Background**

On May 17, 2023, the U.S. Department of Commerce (Commerce) initiated a less-than-fair-value (LTFV) investigation of imports of certain non-refillable steel cylinders from India.¹ Currently, the preliminary determination is due no later than October 4, 2023.

Postponement of Preliminary Determination

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the

¹ See *Certain Non-Refillable Steel Cylinders from India: Initiation of Less-Than Fair-Value Investigation*, 88 FR 33571 (May 24, 2023) (*Initiation Notice*).

⁵ Commerce found Trina Solar (Changzhou) Science & Technology Co., Ltd. to be cross-owned, within the meaning of 19 CFR 351.525(b)(6)(vi), among and across the following companies: Yancheng Trina Solar Guoneng Science & Technology Co., Ltd.; Trina Solar (Su Qian) Technology Co., Ltd.; Trina Solar Yiwu Technology Co., Ltd.; Trina Solar Co., Ltd.; Trina Solar (Yancheng Dafeng) Co., Ltd.; Trina Solar Science & Technology (Yancheng) Co., Ltd.; Trina Solar (Suqian) Optoelectronics Co., Ltd.; Trina Solar (Changzhou) Optoelectronic Device Co., Ltd.; Changzhou Trina Solar Yabang Energy Co., Ltd.; Hubei Trina Solar Energy Co., Ltd.; Turpan Trina Solar Energy Co., Ltd.; Trina Solar (Hefei) Science and Technology Co., Ltd.; Changzhou Hesai PV Ribbon Materials Co., Ltd.; Changzhou Hewei New Material Technology Co., Ltd.; Changzhou Trina Hezhong PV Co., Ltd.; and Changzhou Trina PV Ribbon Materials Co., Ltd. See *Preliminary Results* PDM at 5–7.

investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On September 6, 2023, the petitioner submitted a timely request that Commerce postpone the preliminary determination in the LTFV investigation, in accordance with 19 CFR 351.205(b)(2), which the petitioner notes allows for the extension of the preliminary determination at the petitioner's request.²

For the reasons stated above and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act, is postponing the deadline for the preliminary determination by 50 days (*i.e.*, 190 days after the date on which this investigation was initiated). As a result, Commerce will issue its preliminary determination no later than November 24, 2023.³ In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination, unless postponed.

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: September 7, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–19794 Filed 9–12–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD356]

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Marine Planning Committee (MPC) will hold an online public meeting.

DATES: The online meeting will be held Friday, September 29, 2023, from 10 a.m. to 4 p.m., Pacific Daylight Time or until business for the day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including a proposed agenda and directions on how to attend the meeting and system requirements, will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Kerry Griffin, Staff Officer, Pacific Council; telephone: (503) 820–2409.

SUPPLEMENTARY INFORMATION: The purpose of this online meeting is for the MPC to consider current offshore wind (OSW) energy issues and to provide information and advice to the Pacific Council for consideration at its November 2023 meeting. Meeting topics may include Fisheries Communications Plans for the five California OSW leases and draft Oregon Wind Energy Areas. Other OSW or aquaculture topics may be considered, as appropriate.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of

the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov; (503) 820–2412) at least 10 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 8, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–19808 Filed 9–12–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD354]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council's (Council) Ecosystem Committee will hold a public meeting. See **SUPPLEMENTARY INFORMATION** for the agenda.

DATES: The meeting will be held on Thursday, September 28, 2023, from 8 a.m. to 4 p.m., Alaska Time.

ADDRESSES: The meeting will be a web conference. Join online through the link at <https://meetings.npfmc.org/Meeting/Details/3008>.

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Suite 400, Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Nicole Watson, Council staff; phone: (907) 271–2809 and email: nicole.watson@noaa.gov. For technical support, please contact administrative Council staff, email: npfmc.admin@noaa.gov.

SUPPLEMENTARY INFORMATION:

Agenda

Thursday, September 28, 2023

The Ecosystem Committee agenda will include: (a) an update on the evaluation of marine conservation areas;

² See Petitioner's Letter, "Request to Extend the Preliminary Antidumping Duty Determination," dated September 6, 2023. The petitioner is Worthington Industries.

³ Because the extended deadline for this preliminary determination falls on a Federal holiday (*i.e.*, November 23, 2023), the deadline becomes the next business day. See *Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005).

(b) National Environmental Policy Act (NEPA) changes under the Fiscal Responsibility Act; (c) other updates including the programmatic environmental impact statement (PEIS); and (d) other business. The agenda is subject to change, and the latest version will be posted at <https://meetings.npfmc.org/Meeting/Details/3008> prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: <https://meetings.npfmc.org/Meeting/Details/3008>.

Public Comment

Public comment letters will be accepted and should be submitted electronically to <https://meetings.npfmc.org/Meeting/Details/3008>.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 8, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023-19807 Filed 9-12-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD348]

North Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Halibut and Sablefish Individual Fishing Quota Committee (IFQ Committee) will hold a public meeting. See **SUPPLEMENTARY INFORMATION** for the agenda.

DATES: The meeting will be held on Thursday, September 28, 2023, from 8:30 a.m. to 1 p.m., Alaska Time.

ADDRESSES: The meeting will be a web conference. Join online through the link at <https://meetings.npfmc.org/Meeting/Details/3014>.

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Suite 400, Anchorage, AK 99501-2252; telephone: (907) 271-2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT:

Anna Henry, Council staff; phone: (907) 271-2809; email: anna.henry@noaa.gov. For technical support, please contact our admin Council staff, email: npfmc.admin@noaa.gov.

SUPPLEMENTARY INFORMATION:

Agenda

Thursday, September 28, 2023

The IFQ Committee agenda will include: (a) review and provide recommendations on Area 4 vessel cap initial review analysis; (b) IFQ program review workplan; and (c) other business. The agenda is subject to change, and the latest version will be posted at <https://meetings.npfmc.org/Meeting/Details/3014> prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: <https://meetings.npfmc.org/Meeting/Details/3014>.

Public Comment

Public comment letters will be accepted and should be submitted electronically to <https://meetings.npfmc.org/Meeting/Details/3014>.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 8, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023-19801 Filed 9-12-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD347]

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council is convening a joint ad-hoc sub-panel of its Scientific and Statistical Committee (SSC) with members of the Mid-Atlantic Fishery Council's SSC to provide the Council with input on methods to designate Essential Fish Habitat and to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Friday, September 29, 2023, from 1 p.m. to 5 p.m.

ADDRESSES: Webinar registration URL information: <https://attendee.gotowebinar.com/register/120656441301753431>. Call in

information: Phone: +1 (415) 655-0060/ Access Code: 596-061-701.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465-0492.

SUPPLEMENTARY INFORMATION:

Agenda

The joint SSC Subpanel, comprised of SSC members from both the New England and Mid-Atlantic Fishery Management Councils, will meet to review methods for designating Essential Fish Habitat (EFH) and Habitat Areas of Particular Concern (HAPC). The review will address the following topics: (1) principles applied to improving EFH and HAPC designations; (2) methods for developing EFH text and maps including application of model-based approaches; (3) methods for identifying HAPC; and (4) recommendations for additional near- or longer-term work that might improve EFH or HAPC designations. The subpanel will provide a report summarizing their input. This input will be provided directly to the Mid-Atlantic Fishery Management Council's EFH Fishery Management Action Team, the New England Fishery Management Council's Habitat Plan Development Team, as well as the New England and Mid-Atlantic Fishery Management Councils. There will be opportunities for public input and comment.

Although non-emergency issues not contained on the agenda may come before this panel for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465-0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 8, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023-19800 Filed 9-12-23; 8:45 am]

BILLING CODE 3510-22-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Quarterly Public Meeting

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice of public meeting.

DATES: October 12, 2023, from 1 p.m. to 4 p.m. ET.

ADDRESSES: The meeting will be held virtually only via Zoom webinar.

FOR FURTHER INFORMATION CONTACT: Angela Phifer, 355 E Street SW, Suite 325, Washington, DC 20024; (703) 798-5873; CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Background: The Committee for Purchase From People Who Are Blind or Severely Disabled is an independent government agency operating as the U.S. AbilityOne Commission. It oversees the AbilityOne Program, which provides employment opportunities through Federal contracts for people who are blind or have significant disabilities in the manufacture and delivery of products and services to the Federal Government. The Javits-Wagner-O'Day Act (41 U.S.C. chapter 85) authorizes the contracts.

Registration: Attendees *not* requesting speaking time should register not later than 11:59 p.m. ET on October 11, 2023. Attendees requesting speaking time must register not later than 11:59 p.m. ET on September 29, 2023, and use the comment fields in the registration form to specify the intended speaking topic/s. The registration link will be available by September 15, 2023, on the Commission's home page, www.abilityone.gov, under News and Events.

Commission Statement: This regular quarterly meeting will include updates

from the Commission Chairperson, Executive Director, and Inspector General.

Public Participation: The public engagement session will address modernizing the guidance for project development assignments and order allocations for nonprofit agencies participating in the AbilityOne Program. This discussion will support the future update of Commission Policy 51.301, "Selection of Nonprofit Agencies for Project Assignment and Order Allocation."

The Commission invites public comments and suggestions on the public engagement topic. During registration, you may choose to submit comments, or you may request speaking time at the meeting. The Commission may invite some attendees who submit advance comments to discuss their comments during the meeting. Comments submitted will be reviewed by staff and the Commission members before the meeting. Comments posted in the chat box during the meeting will be shared with the Commission members after the meeting. The Commission is not subject to the requirements of 5 U.S.C. 552(b); however, the Commission published this notice to encourage the broadest possible participation in its meeting.

Personal Information: Speakers should not include any information that they do not want publicly disclosed.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-19783 Filed 9-12-23; 8:45 am]

BILLING CODE 6353-01-P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before October 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be

submitted within 30 days of this notice's publication to OIRA, at <https://www.reginfo.gov/public/do/PRAMain>. Please find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the website's search function. Comments can be entered electronically by clicking on the "comment" button next to the information collection on the "OIRA Information Collections Under Review" page, or the "View ICR—Agency Submission" page. A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting <https://www.reginfo.gov/public/do/PRAMain>.

In addition to the submission of comments to <https://Reginfo.gov> as indicated above, a copy of all comments submitted to OIRA may also be submitted to the Commodity Futures Trading Commission (the "Commission" or "CFTC") by clicking on the "Submit Comment" box next to the descriptive entry for OMB Control No. 3038-0096, at <https://comments.cftc.gov/FederalRegister/PublicInfo.aspx>, or by either of the following methods:

- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail, above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments submitted to the Commission should include only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in section 145.9 of the Commission's regulations.¹ The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable

¹ 17 CFR 145.9.

laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:

Isabella Bergstein, Attorney Adviser, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; (202) 993-1384; email: ibergstein@cftc.gov, and refer to OMB Control No. 3038-0096.

SUPPLEMENTARY INFORMATION:

Title: Swap Data Recordkeeping and Reporting Requirements (OMB Control No. 3038-0096). This is a request for revision of a currently approved information collection.

Abstract: The collection of information is needed to ensure that the CFTC and other regulators have access to swap data as required by the Commodity Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Dodd-Frank Act directed the CFTC to adopt rules providing for the reporting of data relating to swaps. In 2012, the CFTC adopted Regulation 45, which imposes recordkeeping and reporting requirements relating to swaps. The Commission is revising its burden hours and hourly labor cost estimates following the Commission's designation of a Unique Product Identifier ("UPI") and product classification system for certain swap asset classes. The Commission is revising its burden estimates associated with the reporting obligations under part 45 of the Commission rules to account for new burden associated with the requirements of § 45.7.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. On July 6, 2023, the Commission published in the **Federal Register** notice of the proposed revision of this information collection and provided 60 days for public comment on the proposed extension, 88 FR 43086 ("60-Day Notice"). The Commission received no relevant comments that addressed its PRA burden estimates.

Burden Statement: CFTC regulation section 45.7 results in information collection requirements within the meaning of the PRA. With respect to the ongoing reporting and recordkeeping burdens associated with swaps, the CFTC believes that SDs, MSPs, SEFs, DCMs, DCOs, SDRs, and non-SD/MSP counterparties incur an annual time-burden of 1,093 hours. This time-burden represents a proportion of the burden respondents incur to operate and

maintain their swap data recordkeeping and reporting systems.

In addition, the Commission estimates that regulation section 45.7 will create costs for entities required to retrieve and transmit UPIs to update their systems to retrieve and transmit UPIs. The Commission estimates that SDRs, SEFs, DCMs, and reporting counterparties required to retrieve and transmit UPIs will incur a one-time initial burden of one hour per entity to modify their systems to adopt the required changes, for a total estimated hours burden of 1,732 hours. The associated labor cost per entity is estimated to be \$93.31 for a total cost across entities of \$161,620.

Respondents/Affected Entities: Swap Dealers, Major Swap Participants, SEFs, DCMs, DCOs, and other counterparties to a swap transaction (i.e., end-user, non-SD/non-MSP counterparties).

Estimated number of respondents: 1,732.

Estimated average burden hours per respondent: 1.6 hours.

Estimated total annual burden hours on respondents: 2,825 hours.

Frequency of collection: Ongoing.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: September 8, 2023.

Christopher Kirkpatrick,
Secretary of the Commission.

[FR Doc. 2023-19816 Filed 9-12-23; 8:45 am]

BILLING CODE 6351-01-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2022-HA-0090]

Submission for OMB Review; Comment Request

AGENCY: The Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Unmet Needs of Transgender Military Patients at Madigan Army Medical Center; OMB Control Number 0720-MAMC.

Type of Request: New.
Number of Respondents: 50.
Responses per Respondent: 1.
Annual Responses: 50.
Average Burden per Response: 45 minutes.

Annual Burden Hours: 37.5.

Needs and Uses: This collection is necessary in order to identify the unmet needs of transgender patients at Madigan Army Medical Center. Policy changes (and subsequent reversal) regarding transgender military members have limited transgender patient care and led to confusion around services provided. Military providers do not generally have experience or special training in caring for the transgender population and may lack the expertise needed for optimal patient care. This activity will develop and distribute an anonymous survey to accomplish the goal of identifying these unmet needs in order to find areas for improvement and optimize transgender care at Madigan Army Medical Center.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.
OMB Desk Officer: Ms. Jasmeet

Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: September 5, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-19764 Filed 9-12-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, U.S. Department of Defense (DoD).

ACTION: Notice of partially closed meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the U.S. Naval Academy Board of Visitors, hereafter "Board," will take place.

DATES: Open to the public, September 18, 2023, from 9 a.m. to 11 a.m. Eastern Time Zone (ET). Closed to the public, September 18, 2023, from 11 a.m. to noon (12 p.m.) ET.

ADDRESSES: This meeting will be held at the Library of Congress, Washington, DC. Pending prevailing health directives, the meeting will be handicap accessible. Escort is required.

FOR FURTHER INFORMATION CONTACT: Major Alexandra Fitzgerald, USMC, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402-5000, 410-293-1503, afitzger@usna.edu, or visit <https://www.usna.edu/PAO/Superintendent/bov.php>.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 United States Code (U.S.C.), appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), the General Services Administration's (GSA) Federal Advisory Committee Management Final Rule (41 Code of Federal Regulations (CFR) part 102-3). Due to circumstances beyond the control of the Designated Federal Officer, the United States Naval Academy Board of Visitors was unable to provide public notification required by 41 CFR 102-3.150(a) concerning its September 18, 2023 meeting. Accordingly, the Advisory Committee

Management Officer for the Department of Defense, pursuant to 41 CFR 102-3.150(b), waives the 15-calendar day notification requirement.

Purpose of Meeting: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board deems necessary, into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy.

Agenda

Proposed meeting agenda for September 18, 2023.

0900 Call to Order (Open to Public)

0900-1055 Open Meeting (Open to Public)

1055-1100 Break (Open to Public)

1100-1200 Closed Meeting (Closed to Public)

Current details on the board of visitors may be found at <https://www.usna.edu/PAO/Superintendent/bov.php>.

The closed meeting from 11:00 a.m. to 12:00 p.m. on September 18, 2023, will consist of discussions of new and pending administrative or minor disciplinary infractions and non-judicial punishments involving midshipmen attending the Naval Academy to include but not limited to, individual honor or conduct violations within the Brigade, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. For this reason, a portion of the meeting will be closed to the public, as the discussion of such information cannot be adequately segregated from other topics, which precludes opening the closed meeting to the public. Accordingly, the Secretary of the Navy, in consultation with the Department of the Navy General Counsel, has determined in writing that the meeting shall be partially closed to the public because the discussions during the closed meeting from 11 a.m. to noon (12 p.m.) will be concerned with matters protected under sections 552b(c)(5), (6), and (7) of title 5, U.S.C.

Meeting Accessibility: Pursuant to FACA and 41 CFR 102-3.140, this meeting is open to the public. Any public attendance at the meeting will be governed by prevailing health directives at the United States Naval Academy. Please contact the Executive Secretary five business days prior the meeting to coordinate access to the meeting.

Written Statements: Per section 10(a)(3) of the FACA and 41 CFR 102-3.105(j) and 102-3.140, interested persons may submit a written statement for consideration at any time, but should be received by the Designated

Federal Officer at least 3 business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written statements should be submitted via mail to 121 Blake Rd, Annapolis, MD 21402. Please note that since the Board operates under the provisions of the FACA, as amended, all submitted comments and public presentations may be treated as public documents and may be made available for public inspection, including, but not limited to, being posted on the board website.

Dated: September 8, 2023.

J.E. Koningisor,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2023-19769 Filed 9-12-23; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN-2023-HQ-0011]

Submission for OMB Review; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571-372-7574, whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Fleet Readiness Center Southeast (FRCSE) Electronic Sensormatic Intake Application; OMB Control Number 0703-CURE.

Type of Request: Existing collection in use without an OMB Control Number.

Number of Respondents: 1,600.

Responses per Respondent: 1.

Annual Responses: 1,600.

Average Burden per Response: 7 minutes.

Annual Burden Hours: 187.

Needs and Uses: The Sensormatic Electronic (SE) Computer Coordinated Universal Retrieval Entry (CCURE) 9000 application is used as part of the process for issuing access badges to Fleet Readiness Center Southeast (FRCSE) command facilities. The information collected from command employees for this application is per the prescribing policy regulations in OPNAVINST 5530.14E, "Navy Physical Security and Law Enforcement Program," which provides guidance for the protection of people and assets throughout the Navy. FRCSE Security collects information from contractor personnel verbally and in-person to obtain the necessary information required to in the CCURE application for command badge issuance. Once FRCSE security personnel enters all necessary information into the SE CCURE 9000 application, a command badge is issued, allowing the contractor employee access to command facilities. In addition to using information to process personnel access to controlled areas, information may be used for investigative purposes and communications in the event of an emergency or security event.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Sehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.

Dated: September 5, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-19763 Filed 9-12-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF EDUCATION

[Docket No.: ED-2023-SCC-0160]

Agency Information Collection Activities; Comment Request; Study of District and School Uses of Federal Education Funds

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 13, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED-2023-SCC-0160. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 4C210, Washington, DC 20202-8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Clare Allen-Platt, (202) 987-1090.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the

general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Study of District and School Uses of Federal Education Funds.

OMB Control Number: 1850-0951.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 250.

Total Estimated Number of Annual Burden Hours: 1,630.

Abstract: Federal funds account for less than 10 percent of K-12 education spending nationally but can play an important role, particularly in communities that are lower-income or have lower-performing schools. Although each Federal education program has unique goals and provisions, they often allow funds to be used for similar purposes and services or overlapping populations. Congress provided State and local education agencies greater flexibility in their use of Federal funds through the 2015 reauthorization of the Elementary and Secondary Education Act (ESEA). As the COVID-19 pandemic began to disrupt schools in 2020, Congress also created new programs to provide funding and flexibilities for States and districts to respond to the emergency. Because policymakers remain interested in how Federal dollars are spent, this study will examine the distribution and use of pandemic relief funds and explore the possibility of examining

those issues for five "core" Federal education programs that represent the vast share of the Department's K–12 grant making: part A of titles I, II, III, and IV of ESEA, and title I, part B of the Individuals with Disabilities Education Act (IDEA).

Dated: September 8, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–19736 Filed 9–12–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0083]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; IDEA Part B State Performance Plan (SPP) and Annual Performance Report (APR)

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 13, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link www.reginfo.gov/public/do/PRAMain to access the site. Find this information collection request (ICR) by selecting "Department of Education" under "Currently Under Review," then check the "Only Show ICR for Public Comment" checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the "View Information Collection (IC) List" link. Supporting statements and other supporting documentation may be found by clicking on the "View Supporting Statement and Other Documents" link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Christine Pilgrim, (202) 245–7351.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: IDEA Part B State Performance Plan (SPP) and Annual Performance Report (APR).

OMB Control Number: 1820–0624.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 107,700.

Abstract: In accordance with 20 U.S.C. 1416(b)(1), not later than 1 year after the date of enactment of the Individuals with Disabilities Education, as revised in 2004, each State must have in place a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B and describe how the State will improve such implementation. This plan is called the Part B State Performance Plan (Part B—SPP). In accordance with 20 U.S.C. 1416(b)(2)(C)(ii) the State shall report annually to the public on the performance of each local educational agency located in the State on the targets in the State's performance plan. The State also shall report annually to the Secretary on the performance of the State under the State's performance plan. This report is called the Part B Annual Performance Report (Part B—APR). Information Collection 1820–0624 corresponds to 34 CFR 300.600–300.602.

In this information collection revision two revisions are proposed: (1) adding a separate general supervision indicator and continuing the requirement to report on the identification and correction of findings of all noncompliance related to SPP/APR compliance indicators; and (2) revising Indicators 4A and 4B to require States to report on elements of their existing methodology that are necessary for OSEP to analyze and determine the reasonableness of such methodology for

identifying significant discrepancies in local educational agencies (LEAs). The proposed revisions are focused on improving results and the development and learning for all children with disabilities, and aligning with the administration's priorities including, State general supervision systems and the disparities in the use of discipline for children with disabilities.

Dated: September 7, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–19693 Filed 9–12–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0080]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; IDEA Part C State Performance Plan (SPP) and Annual Performance Report (APR)

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 13, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link www.reginfo.gov/public/do/PRAMain to access the site. Find this information collection request (ICR) by selecting "Department of Education" under "Currently Under Review," then check the "Only Show ICR for Public Comment" checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the "View Information Collection (IC) List" link. Supporting statements and other supporting documentation may be found by clicking on the "View Supporting Statement and Other Documents" link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Christine Pilgrim, (202) 245-7351.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: IDEA Part C State Performance Plan (SPP) and Annual Performance Report (APR).

OMB Control Number: 1820-0578.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 61,600.

Abstract: The Individuals with Disabilities Education Improvement Act of 2004, signed on December 3, 2004, became Public Law 108-446. In accordance with 20 U.S.C. 1416(b)(1) and 20 U.S.C. 1442, not later than 1 year after the date of enactment of the Individuals with Disabilities Education Improvement Act of 2004, each Lead Agency must have in place a performance plan that evaluates the Lead Agency's efforts to implement the requirements and purposes of Part C and describe how the Lead Agency will improve such implementation. This plan is called the Part C State Performance Plan (Part C—SPP). In accordance with 20 U.S.C. 1416(b)(2)(C)(ii) and 20 U.S.C. 1442 the Lead Agency shall report annually to the public on the performance of each Part C program located in the State on the targets in the Lead Agency's performance plan. The Lead Agency shall report annually to the Secretary on the performance of the State under the Lead Agency's performance plan. This report is called the Part C Annual Performance Report (Part C—APR).

In this information collection revision, the proposed revision includes adding a separate general supervision indicator and continuing the requirement to report on the

identification and correction of findings of all noncompliance related to SPP/APR compliance indicators. The proposed revision is focused on improving results and the development and learning for all children with disabilities and aligning with the administration's priorities.

Dated: September 7, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023-19691 Filed 9-12-23; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21-385-006.

Applicants: Upper Missouri G. & T. Electric Cooperative, Inc.

Description: Compliance filing: Amend Compliance Filing—Second Partial Settlement (ER21-385) to be effective 4/1/2023.

Filed Date: 9/6/23.

Accession Number: 20230906-5163.

Comment Date: 5 p.m. ET 9/27/23.

Docket Numbers: ER23-2509-001.

Applicants: Southwestern Public Service Company.

Description: Tariff Amendment: 2023-09-xx TxDOT Supplemental Filing—Amnd—729 to be effective 7/29/2023.

Filed Date: 9/6/23.

Accession Number: 20230906-5143.

Comment Date: 5 p.m. ET 9/27/23.

Docket Numbers: ER23-2584-001.

Applicants: Ameren Illinois Company.

Description: Tariff Amendment: Amendment to IMEA Reimb. Agrmt. Roodhouse to be effective 8/9/2023.

Filed Date: 9/7/23.

Accession Number: 20230907-5065.

Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23-2768-000.

Applicants: Duane Arnold Solar, LLC.

Description: Request for Limited Waiver of Duane Arnold Solar, LLC.

Filed Date: 9/1/23.

Accession Number: 20230901-5227.

Comment Date: 5 p.m. ET 9/22/23.

Docket Numbers: ER23-2773-000.

Applicants: River Ferry Solar I LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate

Authorization, Request for Related Waivers to be effective 11/6/2023.

Filed Date: 9/6/23.

Accession Number: 20230906-5140.

Comment Date: 5 p.m. ET 9/27/23.

Docket Numbers: ER23-2774-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, SA No. 7075; Queue No. AE2-194 to be effective 8/8/2023.

Filed Date: 9/7/23.

Accession Number: 20230907-5038.

Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23-2775-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7067; Queue No. AF1-146/AF2-322 to be effective 8/8/2023.

Filed Date: 9/7/23.

Accession Number: 20230907-5048.

Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23-2776-000.

Applicants: New York State Electric & Gas Corporation, New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: New York State Electric & Gas Corporation submits tariff filing per 35.13(a)(2)(iii): NYISO-NYSEG Joint 205: Amended LGIA Bluestone Wind Project SA2629 (CEII) to be effective 8/24/2023.

Filed Date: 9/7/23.

Accession Number: 20230907-5070.

Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23-2777-000.

Applicants: New York State Electric & Gas Corporation, New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: New York State Electric & Gas Corporation submits tariff filing per 35.13(a)(2)(iii): NYISO-NYSEG Joint 205: LGIA Morris Ridge Solar Energy Center Prjct SA2790 (CEII) to be effective 8/24/2023.

Filed Date: 9/7/23.

Accession Number: 20230907-5072.

Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23-2778-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 4132 Choctaw Fields Solar Project Surplus Interconnection GIA to be effective 11/6/2023.

Filed Date: 9/7/23.

Accession Number: 20230907-5077.

Comment Date: 5 p.m. ET 9/28/23.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any

of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: September 7, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-19767 Filed 9-12-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Privacy Act of 1974; System of Records

AGENCY: Federal Energy Regulatory Commission (FERC), DOE.

ACTION: Rescindment of a system of records notice.

SUMMARY: Pursuant to the Privacy Act of 1974 and Office of Management and Budget (OMB) Circular No. A-108, the Federal Energy Regulatory Commission (Commission or FERC) proposes to rescind an existing system of records notice. Specifically, the following SORN is being proposed for rescindment: "FERC-50: Commission Accounting System Records." The basis for rescindment is explained below.

DATES: Please submit comments on this rescindment notice on or before October 13, 2023. If no public comment is

received during the period allowed for comment or unless otherwise published in the **Federal Register** by FERC, the rescindment will become effective a minimum of 30 days after the date of publication in the **Federal Register**. If FERC receives public comments, FERC shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted in writing to Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, or electronically to privacy@ferc.gov. Comments should indicate that they are submitted in response to *Commission Accounting System Records (FERC-50)*.

FOR FURTHER INFORMATION CONTACT: Federal Energy Regulatory Commission, Geoff Gilliar, Director, Office of Executive Director, Financial Information Technology and Travel Division, 888 First Street NE, Washington, DC 20426, (202) 502-6088.

SUPPLEMENTARY INFORMATION: Commission Accounting System Records was identified for rescindment from the FERC's Privacy Act systems of records inventory because the Departmental Integrated Standardized Core Accounting System was decommissioned and replaced by PeopleSoft Financials. OMB requires that each agency provide assurance that systems of records do not duplicate any existing agency or government-wide systems of records. The decommissioned system was replaced by another IT system which is covered by an existing system of records FERC-56: PeopleSoft Financials 87 FR 2777 (January 19, 2022).

SYSTEM NAME AND NUMBER: COMMISSION'S ACCOUNTING SYSTEM RECORDS—FERC—50

HISTORY:

65 FR 21760 (April 24, 2000)

Dated: September 7, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-19765 Filed 9-12-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23-2773-000]

River Ferry Solar I LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of River

Ferry Solar I LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is September 27, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or *OPP@ferc.gov*.

Dated: September 7, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-19766 Filed 9-12-23; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-R08-OAR-2023-0412; FRL-11163-01-R8]

Proposed Information Collection Request; Comment Request; Federal Implementation Plan for Oil and Natural Gas Well Production Facilities, Fort Berthold Indian Reservation (Mandan, Hidatsa and Arikara Nation), North Dakota (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR), "Federal Implementation Plan for Oil and Natural Gas Well Production Facilities, Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nation), North Dakota (Renewal)" (EPA ICR No. 2478.04, OMB Control No. 2008-0001), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through March 31, 2024. This document allows for 60 days for public comments.

DATES: Comments must be received on or before November 13, 2023.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA-R08-OAR-2023-0412, to EPA online using www.regulations.gov (our preferred method), by email to *a-and-r-docket@epa.gov*, or by mail to: EPA

Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT:

Adam Eisele, U.S. Environmental Protection Agency, Region 8, Air and Radiation Division, (Mail Code 8ARD-PM), 1595 Wynkoop Street, Denver, Colorado 80202-1129, telephone number: (303) 312-6246, email address: *eisele.adam@epa.gov*.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through March 31, 2024. An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

This document allows 60 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. EPA will consider the comments received and amend the ICR

as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** document to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: This ICR covers information collection requirements in the final Federal Implementation Plan (FIP) for Oil and Natural Gas Well Production Facilities; Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nation), North Dakota (40 CFR part 49, subpart K, §§ 49.4161 through 49.4168), herein referred to as the FBIR FIP. In general, owners or operators are required to: (1) conduct certain monitoring; (2) keep specific records to be made available at the EPA's request; and (3) to prepare and submit an annual report (40 CFR part 49, subpart K, §§ 49.4166 through 49.4168). These records and reports are necessary for the EPA Administrator (or the tribal agency if delegated), for example, to: (1) confirm compliance status of stationary sources; (2) identify any stationary sources not subject to the requirements and identify stationary sources subject to the regulations; and (3) ensure that the stationary source control requirements are being achieved. All information submitted to us pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to the agency policies set forth in 40 CFR part 2, subpart B.

Form numbers: None.

Respondents/affected entities: Owners or operators of oil and natural gas well production facilities on the Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nation), North Dakota.

Respondent's obligation to respond: Mandatory (42 U.S.C. 7414).

Estimated number of respondents: 3,002 (total).

Frequency of response: Annually.

Total estimated burden: 137,279 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$52,619,019 (per year), which includes \$43,453,950 annualized capital and operation and maintenance costs.

Changes in the estimates: There is an increase of 25,343 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to anticipated industry growth projected to occur over the next 3-year period of this ICR.

Dated: September 5, 2023.

KC Becker,

Regional Administrator, Region 8.

[FR Doc. 2023–19776 Filed 9–12–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–11363–01–R3]

Clean Air Act Operating Permit Program; Order on Petition for Objection to the Title V Permit for Delaware City Refinery

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final order on petition.

SUMMARY: Pursuant to the Clean Air Act (CAA), the Environmental Protection Agency (EPA) Administrator signed an order dated July 5, 2023, granting in part and denying in part a petition dated September 16, 2022, from Delaware Audobon Society, Delaware Concerned Residents for Environmental Justice, Environmental Justice Health Alliance for Chemical Policy Reform, the Widener Environmental and Natural Resources Law Clinic, Environmental Integrity Project, and Earthjustice. The petition requested that EPA object to a Clean Air Act (CAA) title V operating permit issued by the Delaware Department of Natural Resources and Environmental Control (DNREC) to the Delaware City Refinery for its facility located in New Castle County, Delaware.

ADDRESSES: Copies of the final order, the petition, and all pertinent information relating thereto can be requested by electronic mail to the address set forth below in the **FOR FURTHER INFORMATION CONTACT** section. The final order and petition are available electronically at: www.epa.gov/title-v-operating-permits/title-v-petition-database.

FOR FURTHER INFORMATION CONTACT: Britlyn Barnes, EPA Region 3, (215) 814–2089, barnes.britlyn@epa.gov.

SUPPLEMENTARY INFORMATION: The CAA affords EPA a 45-day period to review and object to, as appropriate, title V operating permits proposed by state permitting authorities. Section 505(b)(2) of the CAA authorizes any person to petition the EPA Administrator within 60 days after the expiration of this review period to object to a state title V operating permit if EPA has not done so. Petitions must be based only on objections raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable

to raise these issues during the comment period or that the grounds for objection or other issue arose after the comment period.

EPA received a petition from Delaware Audobon Society, Delaware Concerned Residents for Environmental Justice, Environmental Justice Health Alliance for Chemical Policy Reform, the Widener Environmental and Natural Resources Law Clinic, Environmental Integrity Project, and Earthjustice dated September 16, 2022, requesting that EPA object to the issuance of operating permit no. AQM–003/00016—Parts 1–3, issued by DNREC to Delaware City Refinery in New Castle County, Delaware. On July 5, 2023, the EPA Administrator issued an order granting in part and denying in part the petition. The order itself explains the basis for the EPA's decision.

Sections 307(b) and 505(b)(2) of the CAA provide that a petitioner may request judicial review of those portions of an order that deny issues in a petition. Any petition for review shall be filed in the United States Court of Appeals for the appropriate circuit no later than November 13, 2023.

Cristina Fernandez,

Director, Air & Radiation Division, Region III.

[FR Doc. 2023–19710 Filed 9–12–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

[Notice 2023–14]

Request for Public Comment on Improvements To Report Filing Processes and Website Usability

AGENCY: Federal Election Commission (“Commission”).

ACTION: Notification of request for public comment.

SUMMARY: The Commission seeks public comment on ways to improve its report filing processes and public-facing website.

DATES: Comments must be submitted on or before November 13, 2023.

ADDRESSES: All comments must be in writing. Commenters may submit comments by email to publiccomment2023-14@fec.gov.

All commenters must provide, at a minimum, their first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the

Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, date of birth, phone number, social security number, or driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT:

Robert M. Knop, Assistant General Counsel, or Evan R. Christopher, Attorney, 1050 First Street NE, Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission administers the Federal Election Campaign Act, 52 U.S.C. 30101–45, in relevant part, through a review of disclosure reports that are filed with the Commission. Political committees must file periodic reports, while others must file only upon the occurrence of specific activity, such as the making of independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year. See 52 U.S.C. 30104(a), (c). Some political committees and other regulated persons must file reports electronically, while others may file electronically or in paper form. See 11 CFR 104.18.

The Commission processes the information it receives from both electronic and paper filings, and digitally provides the information to the public on its website with search and filter functions. See 52 U.S.C. 30111(a)(4). In addition, the Commission's website contains legal resources for the public, including databases of concluded enforcement matters, advisory opinions, statutes and legislative history, regulations and related rulemaking materials, and documents from court cases. The Commission also provides campaign guides and other explanatory materials designed for non-lawyers, including candidates, treasurers, journalists, and members of the general public.

The Commission periodically reviews its programs to ensure it is fulfilling its mission of providing transparency to the campaign finance system. As part of that mission, not only does the Commission strive to provide to the public data in an easily usable format, but also strives to streamline the report filing process for filers. The purpose of this Notice is to inform the public that the Commission is examining its existing policies and procedures regarding the filing of reports with the agency and to provide the public with an opportunity to

identify any issues or concerns with the report filing process, as well as potential solutions to those concerns. The Commission also seeks public comment on how to improve its website, including the organization, substance, and ease of use of the information on the website. The Commission will use the comments received to help determine whether to change its policies or processes, and, if so, how.

The Commission welcomes comments on all aspects of report filing. For example, one filer expressed frustration that electronic Form 99 (Miscellaneous Electronic Submission to the FEC) has a character limit, while another filer criticized the inability of the Commission's electronic filing system to accept an Excel spreadsheet. The Commission is also aware that filers have encountered software issues, both with FECFile and third-party filing software. While the Commission has deployed significant resources towards a multi-year project to develop a more user-friendly report-filing software, the Commission is seeking public comment concerning what can be accomplished immediately to improve the report-filing process.

In addition, the Commission seeks public comment on how to improve the Commission's website. Public comments can address any aspect of the website, including how the website displays campaign finance data, the organization of the website, search functions for legal research, or the provision of campaign guides. For example, how can the Commission make campaign finance data more accessible? Can the Commission add filters, searches, or features that would make the data more useful for the public? How can the Commission improve the website's organization or search functions for legal research? Do the campaign guides adequately educate non-lawyer members of the public about campaign finance rules?

The Commission is particularly interested in hearing from members of the public who regularly file reports or use the Commission's website, including political committees, candidates, non-profit organizations, journalists, and law enforcement.

On behalf of the Commission,

Dara Lindenbaum,

Chair, Federal Election Commission.

[FR Doc. 2023-19726 Filed 9-12-23; 8:45 am]

BILLING CODE 6715-01-P

FEDERAL HOUSING FINANCE AGENCY

[No. 2023-N-10]

Request for Applications and Nominations for Members of the Federal Housing Finance Agency Federal Advisory Committee on Affordable, Equitable, and Sustainable Housing

AGENCY: Federal Housing Finance Agency.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Agency is seeking individuals to serve on the Advisory Committee on Affordable, Equitable, and Sustainable Housing (Committee). It is estimated that the Committee will meet at least twice annually to advise FHFA regarding affordable, equitable, and sustainable housing. Recommendations by the Committee help inform FHFA's perspective on regulatory, guidance, or policy changes that may be necessary to expand affordable, equitable, and sustainable housing, with a focus on FHFA's regulated entities and their respective roles in providing a reliable source of liquidity and funding for housing finance and community investment including both single-family and multifamily housing.

DATES: FHFA will consider applications or nominations received before or on October 13, 2023.

ADDRESSES: Applications and nominations should be sent to by email to: ACAESH@fhfa.gov or the Advisory Committee on Affordable, Equitable, and Sustainable Housing Review Group, Office of Housing & Community Investment, Division of Housing Mission and Goals, Federal Housing Finance Agency, Constitution Center, 400 7th Street SW, Washington, DC 20219.

FOR FURTHER INFORMATION CONTACT: Paul Theruviparampil, Senior Policy Analyst, Office of Housing & Community Investment, Division of Housing Mission and Goals, (202-649-3982) (not a toll-free number), ACAESH@fhfa.gov; Ted Wartell, Associate Director, Housing & Community Investment, Division of Housing Mission and Goals, (202) 649-3157 (not a toll-free number), Ted.Wartell@fhfa.gov, Federal Housing Finance Agency, Constitution Center, 400 7th Street SW, Washington, DC 20219. For TTY/TRS users with disabilities, dial 711 and ask to be connected to the contact number above.

Privacy Act Statement

Authority: Pursuant to Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. 10), we are authorized to collect this information as may be necessary or appropriate in the creation of Federal advisory committees, which will provide objective advice and recommendations regarding agency programs and policies. Disclosure of the requested information is voluntary.

Purpose: This information is being collected and maintained in order to determine eligibility and select applicants to fill vacant positions on the FACA committee(s).

Routine Uses: While the information requested is intended to be used primarily for internal purposes, in certain circumstances it may be necessary to disclose this information externally, for example to: a federal agency or other external entity to the extent necessary to address a suspected or confirmed compromise of the security, availability, or confidentiality of information; to other agencies, courts, and persons as necessary and relevant in the course of litigation, and as necessary and in accordance with requirements for law enforcement; or to a person authorized to act on your behalf. A complete list of the routine uses can be found in the SORNs associated with this collection of information, FHFA-30, Advisory Committee Manager (88 FR 9518).

Consequence of Failure to Provide Information: Providing this information is voluntary. The consequence of not submitting your ideas, comments, requests, or questions is that you will not be considered for membership on an FHFA advisory committee.

SUPPLEMENTARY INFORMATION:

Committee Objectives

In accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. 10), FHFA has established the Advisory Committee on Affordable, Equitable, and Sustainable Housing (Committee). The Committee will provide advice and input regarding affordable, equitable, and sustainable housing needs, barriers to access, barriers to long-term sustainability, and any regulations, guidance, or policy changes that may be necessary to expand affordable, equitable, and sustainable housing. The Committee will better position FHFA to fulfill its strategic goal of supporting access to affordable, equitable, and sustainable housing. These interests will focus on FHFA's regulated entities—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks—and their respective roles

in providing liquidity and funding to support housing finance in the single-family and multifamily housing markets.

For more information about the Committee, visit <https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/Fed-Adv-Committee-AES-Housing.aspx>.

Membership

The Committee will consist of approximately 20 members, serving two-year terms which may be extended at the discretion of the Agency. Members will serve at the sole discretion of the Director.

To achieve a fairly balanced membership, FHFA will seek members representative of diverse communities, points of view, organizational size, and geographical location with expertise in affordable, sustainable, or equitable housing in single-family and multifamily housing. The Committee will include members with expertise in at least one of the seven areas related to duties of the Committee:

1. Fair lending, fair housing, or civil rights;
2. Single-family lending, servicing, development, mortgages, or capital markets;
3. Multifamily lending, servicing, development, mortgages, capital markets, or investments (e.g., Low-Income Housing Tax Credits);
4. Consumer, tenant, or community advocacy;
5. Housing market technology;
6. State, local, or tribal government housing policies and programs; and
7. Academic or non-academic affiliated housing research.

The Committee may also include special government employees (SGEs) and representative members. Membership balance is not static and may change to reflect the current work of the Committee. When selected, SGEs serve as special subject matter experts and provide their own personal and independent judgement, in a manner that is free from any conflict of interest as determined by law and regulation.

Representative members gather and synthesize information and present the views of stakeholders they represent. Representatives do not provide their own personal views and independent advice based on their own individual expertise and experience. The Committee membership shall not include Fannie Mae, Freddie Mac, or any of the Federal Home Loan Banks (or any of their respective current officers, employees, or board members).

Responsibilities and Limitations

The duties of the Committee are solely advisory and shall extend only to its submission of advice and recommendations to FHFA (within the scope of the Committee's activities as defined in the Charter) which will be non-binding on FHFA.

No determination of fact or policy will be made by the Committee. The Committee will have no decision-making role and will have no access to non-public FHFA information, to include confidential supervisory, controlled unclassified, or other confidential information.

While members of the Committee serve without compensation, FHFA may (at its sole discretion) reimburse them for travel expenses, including per diem in lieu of subsistence, for travel away from their homes or regular places of business in performance of Committee service (see 5 U.S.C. 5703).

The Committee will meet at such intervals as are required to carry out its functions. It is estimated that the Committee will meet at least twice per year. Generally, Committee meetings are open to the public.

Applications and Nominations

If you wish to apply for membership— An application sent to the application page or mailed to FHFA is required to be considered for membership. The application package must include:

1. The applicant's full name, title, institutional affiliation, and contact information;
2. Resume, curriculum vitae, or other summary of professional experience no more than two pages in length with starting and ending year and month for each entry;
3. The applicant's area of expertise as it relates to the duties of the Committee;
4. A Statement of Interest no more than one page in length describing the applicant's qualifications for service on the Committee and the contributions the applicant hopes to make; and
5. A recommendation letter of no more than one page in length from a third party or outside organization, examples of which can be a trade association, community organization, or government official or entity.

If an individual is interested in serving as a Special Government Employee, the applicant may include two to three references consisting of the names and contact telephone numbers of the reference. Some members of the Committee may be required to adhere to the conflict of interest rules applicable to Special Government Employees. These rules include relevant provisions

in 18 U.S.C. 202(a) related to criminal activity, Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), and Executive Order 12674 (as modified by Executive Order 12731). *Applicants must state in their application that they agree to submit to these pre-appointment checks if required.*

*If you or your organization wish to nominate someone else for membership—*A nomination sent to the application page or mailed to FHFA is required to be considered for membership. The nomination package must include:

1. The nominee's full name, title, institutional affiliation, and contact information;
2. Resume, curriculum vitae, or other summary of professional experience no more than two pages in length with starting and ending year and month for each entry;
3. The nominee's area of expertise as it relates to the duties of the Committee; and
4. A Statement of Nomination of no more than one page in length describing the nominee's qualifications for service on the Committee and the contributions the nominee could be expected to make.

All application and nomination materials must be provided in a single, complete package, and must be sent to the Committee Designated Federal Officer at the electronic address provided above. Incomplete applications will not be considered.

Sandra L. Thompson,

Director, Federal Housing Finance Agency.

[FR Doc. 2023-19805 Filed 9-12-23; 8:45 am]

BILLING CODE 8070-01-P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at Secretary@fmc.gov, or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (www.fmc.gov) or by contacting

the Office of Agreements at (202) 523-5793 or tradeanalysis@fmc.gov.

Agreement No.: 011962-020.

Agreement Name: Consolidated Chassis Management Pool Agreement.

Parties: Ocean Carrier Equipment Management Association, Inc.; Consolidated Chassis Management LLC; Chicago Ohio Valley Consolidated Chassis Pool LLC; Denver Consolidated Chassis Pool LLC; Gulf Consolidated Chassis Pool LLC; Mid-South Consolidated Chassis Pool LLC; Midwest Consolidated Chassis Pool LLC; UIE Pools LLC; United Intermodal Enterprises LLC; Maersk A/S and Hamburg Sud (acting as a single party); CMA CGM S.A., APL Co. Pte Ltd., and American President Lines, Ltd. (acting as a single party); COSCO SHIPPING Lines Co., Ltd.; Evergreen Line Joint Service Agreement; Ocean Network Express Pte. Ltd.; Hapag-Lloyd AG and Hapag-Lloyd USA (acting as a single party); HMM Company Limited; MSC Mediterranean Shipping Co., S.A.; Zim Integrated Shipping Services Ltd.; Matson Navigation Company; Westwood Shipping Lines; and Yang Ming Marine Transport Corp.

Filing Party: Joshua Stein; Cozen O'Connor.

Synopsis: The Amendment would add authority for an SACP loyalty incentive program.

Proposed Effective Date: 10/22/2023.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/454>.

Dated: September 8, 2023.

Jason Guthrie,

*Federal Register Alternate Liaison Officer,
Federal Maritime Commission.*

[FR Doc. 2023-19786 Filed 9-12-23; 8:45 am]

BILLING CODE 6730-02-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at

the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than September 27, 2023.

A. Federal Reserve Bank of Kansas City (Jeffrey Ingarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri 64198-0001. Comments can also be sent electronically to KCAApplicationComments@kc.frb.org:

1. *Shawn Grubb, Weatherford, Oklahoma, individually, and as co-trustee, and Kenneth Baker as co-trustee of the Derek Joseph Grubb 2012 Trust and the Jordan Alyssa Grubb 2012 Trust, all of Clinton, Oklahoma; and the Washita Valley Trust, Clinton, Oklahoma, Kenneth Baker, trustee; to become members of the Shawn Grubb Family Control Group, a group acting in concert, to acquire voting shares of Falcon Bancorporation, Inc., and thereby indirectly acquire voting shares of First Bank and Trust of Memphis, both of Memphis, Texas. Shawn Grubb has previously been permitted by the Federal Reserve System to acquire control of voting shares of Falcon Bancorporation, Inc., and thereby indirectly acquire control voting shares of First Bank and Trust of Memphis, and is currently a member of the Shawn Grubb Family Control Group.*

2. *Shawn Grubb, Weatherford, Oklahoma, individually, and as co-trustee, and Kenneth Baker as co-trustee of the Derek Joseph Grubb 2012 Trust and the Jordan Alyssa Grubb 2012 Trust, all of Clinton, Oklahoma; and the Washita Valley Trust, Clinton, Oklahoma, Kenneth Baker, trustee; to become members of the Shawn Grubb Family Control Group, a group acting in concert, to acquire voting shares of Rocky Financial Corporation, and thereby indirectly acquire voting shares of Bank 360, both of Cordell, Oklahoma. Shawn Grubb has previously been permitted by the Federal Reserve System to acquire control of voting shares of Rocky Financial Corporation, and thereby indirectly acquire control of voting shares of Bank 360, and is*

currently a member of the Shawn Grubb Family Control Group.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-19719 Filed 9-12-23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than October 13, 2023.

A. Federal Reserve Bank of Richmond (Brent B. Hassell, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23219. Comments can also be sent electronically to Comments.applications@rich.frb.org:

1. *Southern Bancshares (N.C.), Inc., Mount Olive, North Carolina; to acquire up to 19.9 percent of the voting shares of Old Point Financial Corporation, and thereby indirectly acquire voting shares of The Old Point National Bank of Phoebus, both of Hampton, Virginia.*

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–19770 Filed 9–12–23; 8:45 am]

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FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than September 28, 2023.

A. Federal Reserve Bank of Boston (Prabal Chakrabarti, Senior Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02210–2204. Comments can also be sent electronically to BOS.SRC.Applications.Comments@bos.frb.org.

1. *Santander Holdings USA, Inc., Boston, Massachusetts*; to engage in community development activities pursuant to section 225.28(b)(12) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–19773 Filed 9–12–23; 8:45 am]

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FEDERAL TRADE COMMISSION

[File No. 231 0037]

Amgen Inc. and Horizon Therapeutics plc; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before October 13, 2023.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: “Amgen Inc. and Horizon Therapeutics plc; File No. 231 0037” on your comment and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex T), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Stephen Mohr (202–326–2850), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule § 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the

terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before October 13, 2023. Write “Amgen Inc. and Horizon Therapeutics plc; File No. 231 0037” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. If you prefer to file your comment on paper, write “Amgen Inc. and Horizon Therapeutics plc; File No. 231 0037” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex T), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form,

must be clearly labeled “Confidential,” and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on <https://www.regulations.gov>—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC website at <https://www.ftc.gov> to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before October 13, 2023. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Amgen Inc. (“Amgen”) and Horizon Therapeutics plc (“Horizon”) to remedy the anticompetitive effects resulting from Amgen’s proposed acquisition of Horizon (the “Acquisition”). Amgen is one of the world’s largest biopharmaceutical companies and Horizon currently enjoys a monopoly on the medicines that treat thyroid eye disease (“TED”) and chronic refractory gout (“CRG”). The Commission alleged in its Complaint that the Acquisition, if consummated, would violate section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by enabling Amgen to leverage its portfolio of blockbuster drugs to foreclose actual or potential rivals to Horizon’s top-selling medications, thereby substantially lessening competition in the markets for the sale of FDA-approved drugs to treat

TED and CRG and tending to create a monopoly in those same markets.

The Consent Agreement, which contains the proposed Decision and Order (“Order” or “D&O”) will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Acquisition. Specifically, under the terms of the proposed Order, Amgen is prohibited from leveraging its drug portfolio to foreclose or disadvantage competitors to Tepezza or Krystexxa for 15 years from the date of the issuance of the proposed Order. To protect robust future competition in the TED and CRG markets, including due to acquisitions by Amgen that may or may not be reportable under the Hart-Scott-Rodino (“HSR”) Premerger Notification Act, the proposed Order requires Amgen to obtain the Commission’s prior approval for the acquisition of any product or business interest involved in: (1) the manufacture or sale of any drug indicated to treat TED or CRG, or (2) the pre-commercial development of any drug in development for TED or CRG that has completed an FDA Phase II or Phase III clinical trial until December 31, 2032.

The Consent Agreement with the proposed Order has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the D&O as well as any comments received, and decide whether it should withdraw, modify, or make final the D&O.

I. The Parties and Transaction

Amgen is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at One Amgen Center Drive, Thousand Oaks, California. Amgen is a biotechnology company that develops, manufactures, and delivers human therapeutics. In 2022, Amgen had global product sales of about \$24.8 billion (and total revenues of about \$26.3 billion). The United States is Amgen’s largest market, representing approximately 72% of its sales. Amgen’s current product portfolio includes 27 approved drugs, nine of which generated 2022 sales in excess of \$1 billion.

Horizon is a public limited company organized, existing, and doing business under and by virtue of the laws of Ireland with its principal executive offices located at 70 St. Stephen’s Green, Dublin 2, D02 E2X4, Ireland. Horizon is a global biotechnology company focused

on the discovery, development, and commercialization of medicines that treat rare, autoimmune, and severe inflammatory diseases. Horizon markets and distributes eleven drug products in the United States through its wholly owned subsidiary, Horizon Therapeutics USA, Inc. Horizon’s U.S. headquarters is in Deerfield, Illinois. The company’s two leading marketed drugs are Tepezza for the treatment of TED and Krystexxa for the treatment of CRG. The two drugs accounted for approximately 74% of Horizon’s approximately \$3.6 billion in net sales in 2022, with Tepezza generating \$1.96 billion and Krystexxa netting \$716 million.

Pursuant to an agreement, dated December 11, 2022, Amgen agreed to acquire all the issued and ordinary share capital of Horizon through a newly formed, wholly owned subsidiary of Amgen for \$116.50 per share in cash. The total value of the Acquisition is approximately \$28 billion.

II. The Relevant Products and Market Structure

The Sale of FDA-Approved Drugs To Treat Thyroid Eye Disease

A relevant line of commerce in which to analyze the effects of the Acquisition is the sale of FDA-approved drugs to treat TED. TED is a serious, progressive, and vision-threatening rare autoimmune condition, with a potential patient population of over 60,000 in the United States. While TED often occurs in people living with hyperthyroidism or Graves’ disease, it is a distinct disease that is caused by autoantibodies activating an IGF-1R-mediated signaling complex on cells within the retro-orbital space. This disease leads to a cascade of negative effects that may cause long-term, irreversible eye damage including proptosis (eye bulging), strabismus (misalignment of the eyes) and diplopia (double vision)—and in some cases can lead to blindness.

Horizon’s Tepezza (teprotumumab-trbw), a fully human monoclonal antibody and a targeted inhibitor of the insulin-like growth factor-1 receptor, is the first and only drug approved by the FDA to treat TED. The FDA granted Tepezza an orphan drug designation in January 2020. Tepezza is administered to patients intravenously by a healthcare provider, typically in an outpatient infusion center or a doctor’s office. The wholesale acquisition cost for a single vial of Tepezza is almost \$15,000, and a full course of treatment of Tepezza can cost over \$350,000.

As the only FDA-approved TED treatment, Tepezza currently faces no

direct competition in the United States. However, Tepezza's monopoly in the TED market is threatened by potential entry in the coming years from rivals developing competing drugs. For example, Viridian Therapeutics, Inc. ("Viridian") is advancing multiple candidates through clinical programs for the treatment of patients with TED that could threaten Tepezza's monopoly. Viridian has initiated a Phase 3 clinical trial for its leading candidate, VRDN-001, in patients with active TED. In addition to its program for intravenously administered VRDN-001, Viridian is developing subcutaneous products with the goal of providing a more conveniently administered therapy to patients with TED.

The Sale of FDA-Approved Drugs To Treat Chronic Refractory Gout

A relevant line of commerce in which to analyze the effects of the Acquisition is the sale of FDA-approved drugs to treat CRG in adult patients. Gout is one of the most common forms of inflammatory arthritis and is associated with multiple comorbidities. CRG is severe chronic gout in adult patients that is refractory to conventional therapy. Of the 9.5 million gout sufferers in the United States, more than 100,000 patients may have CRG, which frequently causes crippling disabilities and significant joint damage.

Horizon's Krystexxa (pegloticase injection) is the first and only FDA-approved drug to treat CRG. The FDA granted Krystexxa an orphan drug designation in September 2010, and subsequently approved a supplemental Biologics License Application in July 2022, expanding the drug's labeling to include Krystexxa co-administered with methotrexate, an immunomodulatory therapy. Krystexxa is a PEGylated uric acid specific enzyme that is administered intravenously in an outpatient infusion center or doctor's office by healthcare providers. The annual wholesale acquisition cost of a course of treatment of Krystexxa is approximately \$650,000.

As the only FDA-approved CRG treatment, Krystexxa currently faces no direct competition in the United States. However, Krystexxa's monopoly in the CRG market is threatened by potential entry in the coming years. For example, Selecta Biosciences ("Selecta") initiated a Phase 3 clinical program of a candidate, SEL-212, for the treatment of CRG. SEL-212 is a combination of Selecta's ImmTOR immune tolerance platform and a therapeutic uricase enzyme (pegadricase).

III. The Relevant Geographic Market

The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition. FDA-approved drugs to treat TED and CRG are prescription pharmaceutical products and regulated by FDA. As such, products sold outside the United States, but not approved for sale in the United States, do not provide viable competitive alternatives for U.S. consumers.

IV. Competitive Effects of the Acquisition

Emerging competition to Tepezza and Krystexxa promises to generate a host of benefits for patients who suffer from TED and CRG, for doctors who prescribe treatments for the conditions, and for patients, employers, and health plans that ultimately pay for the medications. The Acquisition, however, would likely result in substantial competitive harm by foreclosing or disadvantaging such emerging competition and entrenching Tepezza's and Krystexxa's monopoly positions.

Post-Acquisition, Amgen Would Possess the Ability and Incentive To Foreclose or Disadvantage Rivals to Tepezza or Krystexxa

Post-Acquisition, Amgen would have the ability and incentive to sustain and entrench its dominant positions in the markets for FDA-approved TED and CRG drugs by leveraging its portfolio of blockbuster drugs to foreclose or disadvantage future rivals in these markets.

Negotiations with PBMs and payers (*i.e.*, health plans or plan sponsors) are crucial to Amgen, as these entities' formulary and utilization management decisions effectively determine which medications patients can access. Amgen often gives these entities substantial rebates in exchange for favorable formulary positions for its drugs. Drugs reimbursed through the pharmacy benefit are typically self-administered and dispensed through a retail or specialty pharmacy. Most of Amgen's blockbuster drugs, such as Enbrel, are covered under payers' pharmacy benefits. In contrast, drugs that are administered by a healthcare provider, such as Tepezza and Krystexxa, are typically reimbursed under payers' medical benefits. Payers typically rely on PBMs to negotiate their pharmacy benefit coverage and rebates, while medical benefit managers (often owned by the same PBMs) or health plans themselves generally negotiate their medical benefit policies and rebates.

With its broad and powerful drug portfolio, Amgen does not limit itself to

single-product rebate agreements with PBMs and payers. For example, one tactic Amgen employs is providing cross-market bundles or bundled rebates. Through this strategy, Amgen provides greater rebates on one or more of its blockbuster products to secure favorable formulary placement for other medications in different product markets. Due to the enormous sales and consistent volume of Amgen's blockbuster drugs, which last year generated over \$4 billion in global sales, even small enhancements to rebates can ensure payers accept such contracts. Therefore, Amgen post-Acquisition may have the ability to insulate Tepezza and Krystexxa from competitive threats through strategies that include conditioning rebates on one or more of its must-have blockbuster drugs in return for payer agreements to deny coverage to, or otherwise disfavor, potential or actual rivals to the two medications. That strategy would have the effect of raising rivals' barriers to entry and foreclosing them from effectively competing in the markets for the sale of FDA-approved drugs to treat TED and CRG.

A bundle of one of Amgen's blockbuster drugs such as Enbrel with Tepezza or Krystexxa would be both a cross-market bundle (*i.e.*, a bundle involving drugs in different product markets) and a cross-benefit bundle (*i.e.*, a bundle that includes drugs managed by a health plan's medical benefit with drugs managed by its pharmacy benefit). Although payers have historically siloed pharmacy and medical benefits from one another, the same payer determines coverage for drugs that are reimbursed through its beneficiaries' pharmacy and medical benefits and bears the cost of the drug regardless of whether it is reimbursed through the pharmacy or medical benefit. Additionally, each of the three largest PBMs, in part due to recent consolidation, is now vertically integrated with payers that manage patients' medical benefits: OptumRx/United Healthcare, CVS Caremark/Aetna, and Express Scripts/Cigna. Even non-vertically integrated PBMs are increasingly able to combine pharmacy and medical benefit capabilities that allow them to market cross-benefit management tools to their clients. These industry trends, which are altering a market structure that previously siloed pharmacy and medical benefits from one another, would facilitate Amgen's ability to implement cross-benefit bundles that link its blockbuster pharmacy benefit drugs, like Enbrel, and medical benefit drugs acquired through

the Acquisition, like Tepezza and Krystexxa.

Post-Acquisition, Amgen also will have the incentive to leverage its portfolio to bias decisions about drug coverage to protect the value of its newly acquired monopoly products. Multiple rivals are developing competitors to Tepezza and Krystexxa, threatening the massive profit pools generated by these drugs. Competitive entry would likely lead to competition on the merits, with payers leveraging drugs off one another to secure lower prices. Thus, the merged firm will have an incentive to leverage Amgen's blockbuster drugs to defend the monopoly share of the Tepezza and Krystexxa markets.

The Acquisition Would Entrench Tepezza's and Krystexxa's Monopolies

The Acquisition would entrench and extend Tepezza's and Krystexxa's monopolies in the TED and CRG markets by substituting Amgen, with its broad and powerful portfolio of blockbuster drugs, for Horizon with its smaller portfolio, thus raising entry barriers and dissuading smaller firms from aggressively competing. Currently, Horizon has only three prominent on-market drugs focused on small patient populations with rare diseases. The merged firm, however, would have Amgen's large portfolio of blockbuster drugs and ability to contract for cross-benefit bundles to secure preferential formulary placement, which Tepezza's and Krystexxa's impending competitors lack. Any potential competitor to Tepezza or Krystexxa would need a similar portfolio of highly utilized and rebated blockbuster drugs to compete effectively for payer coverage in the TED and CRG markets. As a result, the Acquisition could deter future entry and deprive patients, doctors, and payers of the benefits of competition and access to new treatments for two rare diseases.

V. The Proposed Order

The proposed Order eliminates the competitive concerns raised by the proposed Acquisition by prohibiting the combined company from leveraging Amgen's drug portfolio to foreclose or disadvantage competitors to Tepezza or Krystexxa for 15 years from the date of the issuance of the D&O.

Pursuant to the proposed Order, post-Acquisition Amgen will be prohibited from directly, indirectly, explicitly, or implicitly conditioning any product rebate on, or any contract terms related to, any Amgen product in exchange for the purchase, coverage, placement, or positioning, individually or in any combination, of Krystexxa or Tepezza.

The proposed Order defines rebates broadly to cover any concession or dollar amount provided by Amgen including, rebates, administrative fees, volume discounts, patient conversion payments, market share-related payments, formulary placement fees, disease management program payments, promotional allowances, portal fees, data fees, and specialty pharmacy discounts.

Pursuant to the proposed Order, post-Acquisition Amgen also will be prohibited from directly, indirectly, explicitly, or implicitly conditioning any product rebate on, or any contract terms related to, any Amgen product in exchange for the exclusion, detriment, or disadvantage, individually or in any combination, of any competitor to Tepezza or Krystexxa. This prohibition applies to both drugs and biologics, as well as biosimilars and other drugs that are therapeutic equivalents, which share an FDA indication with Tepezza or Krystexxa, as well as products which are used as off-label treatments for TED or CRG.

If Amgen believes that a federal, state, or local statute, rule, or regulation requires Amgen to enter into a contract which would be prohibited by the proposed Order, Amgen is required to provide 30-days prior notice to the Commission before entering into such a contract. Additionally, because of the concentrated nature of the relevant markets, as well as the possibility of future acquisitions by Amgen in these markets, the proposed Order includes a prior approval for the acquisition of any product or business interest involved in: (1) the manufacture or sale of any drug indicated to treat TED or CRG, or (2) the pre-commercial development of any drug in development for TED or CRG that has completed an FDA Phase II or Phase III clinical trial. This provision is effective until December 31, 2032.

To ensure compliance with the proposed Order, the Commission will appoint a monitor to observe and report on Amgen's compliance. Among other obligations, the proposed Order requires Amgen to submit to the monitor all contracts with payers related to the purchase, coverage, placement, or positioning of Tepezza or Krystexxa in the United States and to maintain any documents related to any offers, negotiations, disputes, or enforcement for such contracts. Additionally, Amgen is required to submit regular reports to the Commission to enable the Commission to determine independently whether Amgen is complying with the proposed Order.

The purpose of the proposed Order is, among other things, to address the

theories of harm to competition alleged by the Commission in its Complaint, in this matter, and in the Commission's Joint Federal Court Complaint for Temporary Restraining Order and Preliminary Injunction filed with the states of California, Illinois, Minnesota, New York, Washington and Wisconsin ("Interested States") in the United States District Court, Northern District of Illinois, June 22, 2023, Case # 1:23-cv-03053, by formalizing Amgen's commitment not to engage in the leveraging or conditioning of Amgen's drug products with Tepezza or Krystexxa, as described above. The Interested States will be receiving certain information from Amgen and the monitor as those states have had a strong interest in the resolution of the federal court complaint, have contributed significantly to the investigation of Amgen's potential anticompetitive transaction with Horizon, and will be kept apprised of Amgen's ongoing compliance with the proposed Order.

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order, and it is not intended to constitute an official interpretation of the proposed Order or to modify its terms in any way.

By direction of the Commission.

April J. Tabor,
Secretary.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya

All too often, Americans can't afford the medicines they need. Drug prices in America are higher than they are anywhere else in the world. At the Federal Trade Commission, we hear regularly from people about how high drug prices harm, and even wreck, lives. At one of our Open Commission Meetings, a parent recounted how high costs forced her son to ration insulin, with fatal results.¹ We've heard from people about how high drug prices have forced them to stay in jobs they would otherwise leave or stunted the growth of their small businesses.² These stories reflect a broader crisis, with around 18 million Americans now reporting that high drug prices lead them to routinely

¹ Fed. Trade Comm'n, Tr. of Open Comm'n Meeting, at 18–19 (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/public_events/1597522/20211021opencommissionmeetingtranscript.pdf.

² *Id.* at 14–19, 18–19; Colo. Dep't of Law, *Prescription Insulin Drug Pricing Report* (Nov. 2020), <https://coag.gov/app/uploads/2020/11/Insulin-Report-102020.pdf>.

ration their medicines or skip them altogether.³

Contributing to the high and rising costs of medicines are business practices that may constitute unfair methods of competition, in violation of Section 5 of the FTC Act. These practices include schemes by pharmaceutical manufacturers to extend or exploit the exclusionary power of their patents beyond their lawful patent rights, such as pay-for-delay agreements, product hopping, and patent thickening. Other practices can impede competition from generics and biosimilars, including restrictive agreements that deny critical inputs to generics⁴ and kickbacks from brand-name pharmaceutical manufacturers to middlemen like pharmacy benefit managers (“PBMs”).⁵ These potentially unlawful practices can be enabled by mergers that give pharmaceutical companies the power to raise entry barriers and exclude rivals in ways that hike prices, inhibit access, and suppress innovation.⁶

Today the Commission announces a settlement of charges that Amgen, Inc.’s acquisition of Horizon Therapeutics plc would violate the antitrust laws. In its complaint, the FTC charged that this \$27.8 billion deal—one of the largest pharmaceutical deals in recent memory—would likely lessen competition in the market for FDA-approved drugs to treat two rare

diseases and would tend to create a monopoly in those markets.⁷ In particular, the complaint stated that the deal would enable Amgen to leverage its portfolio of blockbuster drugs to protect the monopoly positions of two Horizon drugs. Not only was this complaint the Commission’s first challenge to an unconsummated pharmaceutical merger in over fourteen years,⁸ but it also represented a significant advancement in the Commission’s pharmaceutical merger enforcement program.

In recent years, the FTC has been examining and updating our approach to pharmaceutical mergers. As a growing number of analysts, researchers, and advocates have increasingly recognized, pharmaceutical mergers can stifle competition and harm patients even where the merging parties do not sell or develop any overlapping drugs.⁹ For example, consolidation among pharmaceutical companies can facilitate collusion, distort incentives to research and develop new drugs, increase the bargaining leverage of large incumbents, and reduce potential entrants’ access to capital. Acquisitions by the largest pharmaceutical companies can unlock additional means of profitably exploiting market power, especially where the company has a history of illegal behavior. The Pharmaceutical Merger Task Force—launched by the FTC, DOJ, and state and international competition enforcers during Commissioner Slaughter’s tenure as Acting Chair—worked to better understand the market behavior, incentives, and business decisions of pharmaceutical companies and the full set of mechanisms by which mergers and acquisitions in the pharmaceutical industry can harm patients and competition.¹⁰

Drawing on this experience and learning, the Commission’s lawsuit against Amgen and Horizon reflects an advance in our pharmaceutical merger program. While the companies do not have drugs that directly compete with one another, Commission staff focused on the deal rationale and assessed how the acquisition would change the combined firm’s power and incentive to thwart competition.

Several of Amgen’s major revenue streams could dry up in coming years. Patents covering Enbrel, the blockbuster rheumatoid arthritis drug that Amgen acquired in 2002 and that generates billions of dollars in annual revenue, will expire by 2030. The Inflation Reduction Act of 2022, which empowers Medicare and Medicaid to negotiate drug prices, could further reduce future revenues from Enbrel. Other Amgen drugs face similar pressures. Against this backdrop, Amgen sought an acquisition that could reliably replace its key moneymakers.

What Amgen found in Horizon was a pair of “orphan drugs” that are the only FDA-approved therapies for treating two rare diseases: thyroid eye disease and chronic refractory gout. Horizon’s monopoly positions in these drugs have allowed it to charge monopoly prices: around \$400,000 for a six-month course of treatment for Tepezza and around \$650,000 for a course of treatment of Krystexxa. At 72% of Horizon’s sales, these two drugs comprise the vast majority of Horizon’s value. The profitability and security of Horizon’s monopolies account for the premium that Amgen was willing to pay, resulting in the \$27.8 billion deal value.

Reaping the full value of this investment, however, would require protecting Horizon’s monopolies from rivals that could enter these markets once Horizon’s orphan drug exclusivity ends after 2027. Competitors are already actively developing their own drugs to treat thyroid eye disease and chronic refractory gout. One exclusionary tactic that Amgen has previously deployed is cross-product bundling, where it uses its blockbuster drugs to secure from

³ Dan Witters, *In U.S., an Estimated 18 Million Can’t Pay for Needed Drugs*, Gallup (Sept. 21, 2021), <https://news.gallup.com/poll/354833/estimated-million-pay-needed-drugs.aspx>.

⁴ Statement of Chair Lina M. Khan on the Ruling by Judge Denise L. Cote, *Federal Trade Commission et al. v. Vvera Pharmaceuticals, LLC et al.* (Jan. 14, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599663/chair_khan_statement_on_the_ruling_by_judge_cote_regarding_ftc_v_vvera_pharmaceuticals_llc.pdf.

⁵ Remarks of Chair Lina M. Khan Regarding Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Chair-Lina-Khan-Regarding-Policy-Statement-Rebates-Fees.pdf; Statement of Chair Lina M. Khan Regarding the Policy Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports (July 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofChairLinaMKhanrePBMLetterWithdrawal.pdf; Statement of Commissioner Rohit Chopra Regarding the Commission’s Report on Pharmacy Benefit Manager Rebate Walls (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590528/statement_of_commissioner_rohit_chopra_regarding_the_commissions_report_on_pharmacy_benefit_manager.pdf.

⁶ Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes (June 24, 2019), https://www.ftc.gov/system/files/documents/reports/ftc-report-standalone-section-5-address-high-pharmaceutical-drug-biologic-prices/p180101_section_5_report_dissenting_statement_by_chopra_and_slaughter_6-27-19.pdf.

⁷ Complaint ¶¶ 77 & 79, *In re Amgen Inc. & Horizon Therapeutics plc*, Docket No. 9414 (FTC June 22, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Amgen-Horizon-Part-III-Complaint-PUBLIC.pdf.

⁸ Press Release, Fed. Trade Comm’n, FTC Authorizes Suit to Stop CSLs Proposed \$3.1 Billion Acquisition of Talcis Biotherapeutics (May 27, 2009), <https://www.ftc.gov/news-events/news/press-releases/2009/05/ftc-authorizes-suit-stop-csls-proposed-31-billion-acquisition-talcis-biotherapeutics>.

⁹ See, e.g., Michael A. Carrier & Gwendolyn J. Lindsay Cooley, *Prior Bad Acts and Merger Review*, 111 Geo. L.J. Online 106 (2023); Robin Feldman & Mark Lemley, *Atomistic Antitrust*, 63 Wm. & Mary L. Rev. 1869 (2022); Patricia Danzon & Michael Carrier, *The Neglected Concern of Firm Size in Pharmaceutical Mergers*, 84 Antitrust L.J. No. 2 (2022); Justus Haucap, Alexander Rasch, & Joel Stiebale, *How Mergers Affect Innovation: Theory and Evidence*, 63 Int’l J. Indus. Org. 283 (2019).

¹⁰ Press Release, Fed. Trade Comm’n, FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers (Mar. 16, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach-pharmaceutical-mergers>; Press Release, Fed. Trade Comm’n, FTC and Justice Department to Hold Two-Day Virtual Public Workshop Examining Antitrust Enforcement in the Pharmaceutical Industry (May 31, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-justice-department-hold-two-day-virtual-public-workshop-examining-antitrust-enforcement>; Fed. Trade Comm’n and U.S. Dep’t of Justice, *The Future of Pharmaceuticals: Examining the Analysis of Pharmaceutical Mergers, FTC-DOJ Workshop Summary* (June 1, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Future%20of%20Pharma%20Workshop%20-%20Summary.pdf.

PBMs preferential placements or exclusionary access for its non-blockbuster drugs, thereby excluding rivals. This sort of cross-product bundling scheme can lock out new competitors—even if their products are more affordable or effective. Based on these facts, the Commission's complaint charged that Amgen's acquisition of Horizon would give Amgen the ability and incentive to engage in similar cross-product bundling that would exclude Horizon's rivals and maintain its monopolies, harming patients in the long run.

The order announced today prohibits Amgen from engaging in any cross-product bundling or exclusionary rebating schemes involving Horizon's monopoly drugs. Several features of this conduct suggest that an order alone can effectively halt it. For example, because this deal would not give a firm control over products or services that its rivals use to compete, it does not raise traditional concerns about degrading competitors' access to key inputs or improper information exchange, which can be achieved through subtle and varied means that are difficult to detect. By contrast, Amgen can only engage in exclusionary rebating schemes and cross-product bundling in partnership with PBMs, who would need to agree to accept rebates in exchange for privileging Amgen's drugs or excluding those of its rivals. Given the significant financial sums involved, these agreements would be documented, and the FTC's proposed order will require Amgen to regularly submit all such agreements and other key documents to aid the Commission in identifying even implicit efforts to bundle. Amgen is also required to notify its trading partners about the FTC's order, ensuring that market participants are on alert about the prohibited conduct and are positioned to report any suspected violations.¹¹

The proposed order also prohibits Amgen from acquiring any drugs that could compete with Horizon's two monopoly drugs without first seeking the Commission's approval. Because Amgen could try to neutralize Horizon's rivals not just through excluding them but also through acquiring them, this prior approval provision will position the FTC to block acquisitions that would unlawfully maintain Horizon's monopolies.¹²

¹¹ Any suspicions of order violations by Amgen may be submitted to the Bureau of Competition by email at antitrust@ftc.gov.

¹² Statement of the Commission on Use of Prior Approval Provisions in Merger Orders, Fed. Trade Comm'n (Oct. 25, 2021), <https://www.ftc.gov/>

Critically, the six state attorneys general who joined the FTC's complaint will be able to independently monitor Amgen's compliance with the proposed order. California, Illinois, Minnesota, New York, Washington, and Wisconsin will also have access to Amgen's documents and reports and will serve as another key check on any violations. I am grateful to our state partners for their close collaboration on this enforcement matter, and empowering them to independently monitor compliance with our consent orders—and take corrective action as appropriate—positions our remedies for greater success.

The FTC assesses each merger based on the specific facts at hand, and there is no guarantee that the relief achieved in this matter would adequately resolve concerns about cross-product bundling in any future merger actions. A distinct feature of the conduct at issue here is that it involves bundling across different insurance benefit arrangements, which makes it easier to detect. The conduct also involves orphan drugs for rare diseases, the selection and administration of which involves providers with incentives to resist and report exclusionary behavior. As the Commission evaluates proposals to settle charges in future pharmaceutical mergers, we will continue to learn from past experience and seek to fully protect the public from deals that violate the antitrust laws. The merger guidelines we recently proposed with the U.S. Department of Justice further describe how we will assess transactions to determine if they may lessen competition or tend to create a monopoly.¹³

Tackling unlawful pharmaceutical mergers is just one aspect of the FTC's work addressing high drug prices. The bundling and exclusionary rebating practices at issue in this matter highlight deeper concerns about how pharmaceutical companies and pharmacy benefit managers may work together to deprive Americans of access to affordable drugs. The FTC continues to scrutinize these practices through its inquiry into PBMs.¹⁴ And our teams

[system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf).

¹³ U.S. Dep't of Justice and Fed. Trade Comm'n, *Merger Guidelines: Draft for Public Comment Purposes* (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf; Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding FTC–DOJ Proposed Merger Guidelines (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_chair_statement_re_draft_merger_guidelines.pdf.

¹⁴ Statement of Chair Lina M. Khan Regarding 6(b) Study of Pharmacy Benefit Managers,

will continue to challenge unlawful practices that raise drug prices, inhibit access, stifle innovation, or otherwise hurt patients.

[FR Doc. 2023–19809 Filed 9–12–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–1198]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Use of the Cyclosporiasis National Hypothesis Generating Questionnaire (CNHQQ) During Investigations of Foodborne Disease Clusters and Outbreaks” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on July 7, 2023, to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who

Commission File No. P221200 (June 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Khan-6b-Study-Pharmacy-Benefit-Managers.pdf; Press Release, Fed. Trade Comm'n, FTC Further Expands Inquiry Into Prescription Drug Middlemen Industry Practices (June 8, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-further-expands-inquiry-prescription-drug-middlemen-industry-practices>.

are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639-7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

Proposed Project

Use of the Cyclosporiasis National Hypothesis Generating Questionnaire (CNHGQ) During Investigations of Foodborne Disease Clusters and Outbreaks (OMB Control No. 0920-1198, Exp. 9/30/2023)—Extension—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is requesting a three-year Paperwork Reduction Act (PRA) clearance for an Extension of the information collection request (ICR) “Use of the Cyclosporiasis National Hypothesis Generating Questionnaire

(CNHGQ) During Investigations of Foodborne Disease Clusters and Outbreaks” (OMB Control No. 0920-1198, Exp. Date 09/30/2023).

An estimated one in six Americans per year becomes ill with a foodborne disease. Foodborne outbreaks of cyclosporiasis, caused by the parasite *Cyclospora cayetanensis*, have been reported in the United States since the mid-1990s and have been linked to various types of fresh produce. During the 15-year period from 2000–2014, 31 U.S. foodborne outbreaks of cyclosporiasis were reported; the total case count was 1,562. It is likely that more cases (and outbreaks) occurred than were reported. In addition, because of insufficient data, many of the reported cases could not be directly linked to an outbreak or to a particular food vehicle. In recent years, from 2018 onward the number of cases reported annually to CDC has increased substantially to over 1,000 cases; notably, in 2018 and again in 2019 over 2,000 cases were reported.

Collecting the requisite data for the initial hypothesis-generating phase of investigations of multistate foodborne disease outbreaks is associated with multiple challenges, including the need to have high-quality hypothesis-generating questionnaire(s) that can be used effectively in multijurisdictional investigations. Such a questionnaire was developed in the past for use in the context of foodborne outbreaks caused by bacterial pathogens; that questionnaire is referred to as the Standardized National Hypothesis Generating Questionnaire (SNHGQ). However, not all of the data elements in the SNHGQ are relevant to the parasite *Cyclospora* (*e.g.*, questions about consumption of meat and dairy products); on the other hand, additional data elements (besides those in the SNHGQ) are needed to capture information pertinent to *Cyclospora* and to fresh produce vehicles of infection.

Therefore, the Cyclosporiasis National Hypothesis Generating Questionnaire (CNHGQ) has been developed, by using core data elements from the SNHGQ and incorporating modifications pertinent to *Cyclospora*.

The core data elements from the SNHGQ were developed by a series of working groups comprised of local, State, and Federal public health partners. Subject matter experts at CDC developed the CNHGQ by modifying the SNHGQ to include and focus on data elements pertinent to *Cyclospora*/cyclosporiasis. Input also was solicited from State public health partners. Because relatively few data elements in the SNHGQ needed to be modified, a full vetting process was determined not to be necessary. The CNHGQ has been designed for administration over the telephone by public health officials, to collect data elements from case-patients or their proxies. The data that are collected will be pooled and analyzed at CDC, to generate hypotheses about potential vehicles/sources of infection.

CDC requests OMB approval to collect information via the CNHGQ from persons who have developed symptomatic cases of *Cyclospora* infection during periods in which increased numbers of such cases are reported (typically, during spring and summer months). In part because molecular typing methods are not yet available for *C. cayetanensis*, it is important to interview all case-patients identified during periods of increased reporting, to help determine if their cases could be part of an outbreak(s). The CNHGQ is not expected to entail substantial burden for respondents. The estimated total annualized burden associated with administering the CNHGQ is 1875 hours (approximately 2,500 individuals interviewed × 45 minutes/response). There will be no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Ill individuals identified with cyclosporiasis	Cyclosporiasis National Hypothesis Generating Questionnaire.	2,500	1	45/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.

[FR Doc. 2023-19708 Filed 9-12-23; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-23-22GA]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Expanding PrEP in Communities of Color (EPICC)” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on June 13, 2022, to obtain comments from the public and affected agencies. CDC received four comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy

of the information collection plan and instruments, call (404) 639-7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

Proposed Project

Expanding PrEP in Communities of Color (EPICC)—New—National Center for HIV, Viral Hepatitis, STD, TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC is requesting approval for 36 months for a data collection titled, Expanding PrEP in Communities of Color (EPICC). The purpose of this study is to implement and evaluate the effectiveness of a clinic-based intervention that utilizes evidence-based education and support tools to: (1) increase provider knowledge of and comfort with preexposure prophylaxis (PrEP) modalities in clinical practice; and (2) improve PrEP adherence among young men who have sex with men (YMSM). The information collected in this study will be used to: (1) describe real-world PrEP use including factors influencing selection and change of PrEP regimens; (2) understand and describe barriers and facilitators impacting the implementation of new PrEP modalities in clinical practice; (3) evaluate the feasibility and acceptability of the EPICC+ mobile app among YMSM on PrEP; and (4) evaluate the feasibility and acceptability of implementing a provider training.

This study has two aims: In Aim 1, the study team will deliver training to health providers that will focus on implementation of evidence-based tools to enhance the providers’ ability to engage in PrEP screening, counseling, initiation and to provide support for adherence and persistence. The study will utilize web-based computer-assisted surveys to measure healthcare provider knowledge both pre- and post-training. Post-training and at three months, providers will complete a patient interaction assessment via teleconference and receive personalized

feedback to assess and enhance their tailored motivational interviewing skills.

For Aim 2a, the study will initiate an effectiveness-implementation trial with 400 YMSM to test the effectiveness of the EPICC+ intervention package in increasing PrEP adherence and persistence among YMSM. The intervention will utilize a mobile app-based platform, EPICC+, to support ongoing participant engagement and monitoring, as well as to provide additional adherence support. YMSM participants will complete quarterly web-based computerized assessments during the 18-month follow up period. The assessments will measure PrEP knowledge, usage, and choice, and gather information about sexual behaviors, HIV status of partners, and substance use. YMSM participants will be mailed four dried blood spot collection kits to measure PrEP metabolites (baseline, six, 12, and 18 months). To further examine the participant experience and intervention satisfaction, a subset of YMSM participants (45) will be invited to participate in a web-based exit interview at the close of the follow up period (18 months). Additionally, study staff will collect data to measure mobile app use and conduct medical record abstractions three times during the follow up period (six, 12, and 18 months).

In Aim 2b, the study team will conduct focus groups with health providers from the participating clinics to gather feedback on overall perceptions about the effectiveness of the intervention and the barriers and facilitators to implementation of the evidence-based tools (EBT) within their clinical site. Providers will complete a short web-based computer-assisted pre-focus group survey prior to the virtual two-hour focus group. To describe PrEP services implementation at the facility level, each participating clinic will complete a web-based computer-assisted clinic assessment at six-month intervals during the three-year data collection period (baseline, six, 12, 18, 24, 30, and 36 months).

This study will be carried out in nine clinics located in Chicago, IL; Bronx, New York City, NY; Philadelphia, PA; Charlotte, NC; Raleigh, NC; Tuscaloosa, AL; Tampa, FL; Orlando, FL; and Houston, TX. Aim 1 will include healthcare providers from the nine clinic sites, all involved in the direct delivery of PrEP services. Providers may include but are not limited to medical doctors, nurses, adherence counselors, pharmacists, and social workers. Health providers will be recruited via staff

emails. Aim 2a participants will include YMSM ages 18–39, inclusive. Participants will identify as a cisgender male; report sex with a man in the past 12 month; have an active prescription for PrEP; receive care at one of the nine participating study sites; provide a mailing address within the 50 states where packages can be received; have daily smartphone access; and be fluent in written/spoken English or Spanish. We will use purposive sampling to ensure at least 60% patient sample is African American or Black or Hispanic/Latino/Latinx. Patient participants will be recruited to the study using a combination of approaches including social media, referral and in-person outreach. Aim 2b will include healthcare providers from the nine clinic sites, all involved in the direct delivery of PrEP services. Providers may include but are not limited to medical doctors, nurses, adherence counselors, pharmacists, and social workers. Health providers will be recruited via staff emails.

Overall, this study will enroll up to 487 participants. Total study enrollment for Aim 1 is 30 healthcare providers; over the three-year study period (estimated annual enrollment is 10). Total enrollment for Aim 2a is 400 YMSM; over the three-year study period (estimated annual enrollment is 134). For Aim 2b, total study enrollment is 48 healthcare providers (estimated annual

enrollment is 16). Additionally, a clinic staff member at each of the nine participating clinic sites will complete a clinic assessment form every six months throughout the study period.

For the Aim 1 provider training, it is expected that 50% of providers screened will meet eligibility and decide to enroll in the study. We estimate that screening and the collection of contact information will each take five minutes. Pre-training and post-training surveys will take approximately 15 minutes each to complete. Patient interaction assessments delivered at baseline and three months will take approximately 15 minutes each to complete.

For Aim 2a, the effectiveness-implementation trial, it is expected that 50% of YMSM screened will meet study eligibility. The initial screening will take approximately five minutes to complete. The collection of contact information and the completion of the HIPAA form will take approximately five minutes each to complete. The baseline assessment will take approximately 45 minutes to complete. The follow-up assessments will take approximately 45 minutes to complete and will be administered quarterly for a total of six times during the 18-month follow up period. Study staff will assist participants during the EPICC+ app setup, a process that will take 30 minutes. The app setup is required of all

participants but app use after the setup is voluntary. Participants will be mailed a dried blood spot (DBS) specimen collection kit that will take approximately 30 minutes to read, collect the specimen, and ship. The patient exit interview takes approximately 60 minutes to complete and will be delivered one time to a subset (45) of YMSM participants. For the Aim 2b provider focus groups, it is expected that 50% of providers screened will meet eligibility and decide to enroll in the study. We estimate it will take approximately five minutes to conduct the screening, five minutes to collect contact information, and another five minutes to conduct the pre-focus group survey. Providers will attend one focus group that is expected to take 120 minutes to complete. Clinic-level assessments will be completed by clinic staff. The baseline and study end assessments are estimated to take 120 minutes to complete. The assessments conducted at six-month intervals between the baseline and study end points are expected to take 90 minute to complete.

CDC is requesting 3,535 total burden hours across 36-months of data collection. The total estimated annualized burden hours are 759. Participation of respondents is voluntary. There is no cost to participants other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Health Practitioners	Aim 1 Provider Training Screener	20	1	2
Health Practitioners	Aim 1 Provider Training Contact Information	10	1	1
Health Practitioners	Aim 1 Provider Pre-Training Survey	10	1	3
Health Practitioners	Aim 1 Provider Post-Training Survey	10	1	3
Health Practitioners	Aim 1 Provider Patient Interaction	10	2	5
General Public—Adults	Aim 2a Cohort Screener	267	1	22
General Public—Adults	Aim 2a Cohort Contact Information	134	1	11
General Public—Adults	Aim 2a Cohort HIPAA Form	134	1	11
General Public—Adults	Aim 2a Cohort Baseline Survey	134	1	101
General Public—Adults	Aim 2a Cohort Follow-Up Survey	134	3	302
General Public—Adults	Aim 2a Cohort App Setup	134	1	67
General Public—Adults	Aim 2a Cohort Blood Collection Instructions	134	2	134
General Public—Adults	Aim 2a Cohort Exit Interview	15	1	15
Health Practitioners	Aim 2b Provider Focus Group Screener	32	1	3
Health Practitioners	Aim 2b Provider Focus Group Contact Information	16	1	1
Health Practitioners	Aim 2b Provider Pre-Focus Group Survey	16	1	1
Health Practitioners	Aim 2b Provider Focus Group Guide	16	1	32
Health Practitioners	Aims 1&2 Clinic Assessment (Baseline and Final)	9	1	18
Health Practitioners	Aims 1&2 Clinic Assessment (every 6 months)	9	2	27

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.

[FR Doc. 2023–19706 Filed 9–12–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–23EH]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Public Health Emergency Management Capacity Assessment Tool (PHEM Tool)” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on May 1, 2023 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Public Health Emergency Management Capacity Assessment Tool (PHEM Tool)—New—Office of Readiness and Response (ORR), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention’s (CDC) Global Emergency Management Capacity Development (GEMCD) team strengthens emergency management capacity development globally. It helps countries to prepare for, anticipate, and respond to all forms of public health threats. GEMCD’s mission is to build resilient Public Health Emergency Management (PHEM) programs throughout the world.

The GEMCD team’s Emergency Management Technical Advisors (EMTAs) will use the PHEM Tool to guide an in-person interview with GHSA countries Ministry of Health, Public Health Emergency Operations Center (PHEOC) Manager and optional additional staff, to characterize the country’s PHEM program and capabilities. EMTAs will document responses in an excel based form that will be entered into and maintained in the CDCReady data base. Collected data will identify strengths and weaknesses, capabilities, and gaps in PHEM programs and PHEOCs in GHSA countries. Findings will guide GEMCD team program planning initiatives and determine appropriate technical assistance (TA) for GHSA countries. Data will be analyzed to identify the presence or absence of specific PHEM and PHEOC requirements, such as plans, policies, and procedures, etc. Additional analysis will focus upon the status of PHEM and PHEOC plans, policies, and procedures, e.g., date of publication, relevance, etc. The survey will be conducted annually to identify progress and document changes from one year to the next in terms of PHEM program and PHEOC capabilities.

OMB approval is sought for three years. The estimated annualized burden for this information collection is 72 hours. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Ministry of Health personnel responsible for Public Health Emergency Management (PHEM) Program in participating GHSA countries.	PHEM Tool	12	1	6

Jeffrey M. Zirger,

Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.

[FR Doc. 2023–19707 Filed 9–12–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services**

[Document Identifier: CMS–R–266]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by October 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Disproportionate Share Hospital (DSH) Annual Reporting Requirements; *Use:* States are required to submit an annual report that identifies each disproportionate share hospital (DSH) that received a DSH payment under the State's Medicaid program in the preceding fiscal year and the amount of DSH payments paid to that hospital in the same year along with other information that the Secretary determines necessary to ensure the appropriateness of DSH payments; *Form Number:* CMS–R–266 (OMB control number: 0938–0746); *Frequency:* Yearly; *Affected Public:* State, local, or Tribal governments; *Number of Respondents:* 51; *Total Annual Responses:* 51; *Total Annual Hours:* 2,142. (For policy questions regarding this collection contact Rich Cuno at 410–786–1111.)

Dated: September 8, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–19785 Filed 9–12–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Administration for Children and Families****Proposed Information Collection Activity; Financing for Early Care and Education: Quality and Access for All (New Collection)**

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, United States Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) at the U.S. Department of Health and Human Services seeks approval to collect information to explore the role of Head Start in the early care and education (ECE) financing landscape, as well as how the use of multiple funding sources within a single Head Start program may be associated with the provision of Head Start's comprehensive services and with state-level differences in ECE funding. Survey data will be collected from Head Start program directors and state government administrators.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing OPREinfocollection@acf.hhs.gov. Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The proposed data collection seeks to better understand Head Start's participation in or use of coordinated funding, defined as the piecing together or combining of multiple funding sources. The data collection effort will consist of two surveys: (1) a census survey of Head Start program directors (of any grant recipient with a Head Start grant, Early Head Start grant, or both, or one of their delegate programs), and (2) a census survey of three state government administrative positions in each of the 50 states and Washington, DC (the Head Start Collaboration Office Director, the administrator of state pre-kindergarten funds, and the administrator of the federal Child Care and Development Fund [CCDF]). The surveys will identify the most common approaches to coordinated funding; examine how

these approaches relate to the provision of high-quality, comprehensive ECE services in Head Start programs; understand policy levers and conditions that influence Head Start programs' decisions around and ability to coordinate funding; and document how participation in coordinated funding

relates to Head Start's engagement with other ECE programs and system efforts. The resulting insights will inform ACF about the prevalence of coordinated funding in Head Start, facilitators and challenges of coordinated funding for Head Start programs, and potential

associations with program quality. They will also inform future case studies.

Respondents: Head Start Program Directors, state-based Head Start Collaboration Office Directors, state administrators of state pre-kindergarten funds, and state-based administrators of federal CCDF.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total/annual burden (in hours)
Program Director Survey (Head Start Program Directors or financial administrators)	1,642	1	.83	1,363
ECE State Administrator Survey (State-based Head Start Collaboration Office Directors, administrators of state pre-kindergarten funds, state-based administrators of federal CCDF)	138	1	.60	83

Estimated Total Annual Burden Hours: 1,446.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 9835; 42 U.S.C. 9844.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023-19722 Filed 9-12-23; 8:45 am]

BILLING CODE 4184-22-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review: Strengthening Child Welfare Systems To Achieve Expected Child and Family Outcomes Evaluation (New Collection)

AGENCY: Children's Bureau, Administration for Children and Families, United States Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Children's Bureau, Administration for Children and Families (ACF), U.S. Department of Health and Human Services, is proposing to collect data for a new process and outcome study, Strengthening Child Welfare Systems to Achieve Expected Child and Family Outcomes (SCWS) Evaluation.

DATES: *Comments due within 30 days of publication.* The Office of Management and Budget (OMB) must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. You can also obtain copies of the proposed collection of information by emailing infocollection@acf.hhs.gov. Identify all emailed requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The SCWS study will collect information to understand (1) implementation processes and the impact of grant interventions and (2) examine whether and the degree to which grant recipients were able to address common Child and Family Services Reviews (CFSR) outcomes. Proposed data sources for this effort include one survey and one focus group. The survey will gather information to understand the factors that supported or hindered implementation, as well as assess collaboration efforts and the intended impact of grant interventions. The focus groups will gather information to understand implementation of SCWS strategies and interventions, successes and challenges, and the perceived effect of the strategies on short and long-term child welfare outcomes, with specific attention to CFSR outcomes related to permanency.

Respondents: Respondents will include grant recipient staff, evaluators, and community partners.

ANNUAL BURDEN ESTIMATES				
Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total/annual burden hours
SCWS web-based survey	60	1	0.5	30
SCWS focus group	30	1	1.5	45

Estimated Total Annual Burden Hours: 75.

Authority: Title II, section 203(b)(4) of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 (42 U.S.C. 5113(b)(4)).

Mary B. Jones,
ACF/OPRE Certifying Officer.
[FR Doc. 2023–19775 Filed 9–12–23; 8:45 am]
BILLING CODE 4184–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Serious Medical Procedure Request (SMR) Form (Office of Management and Budget #: 0970–0561)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families’ (ACF) Office of Refugee Resettlement is requesting a 3-year extension of the Serious Medical Procedure Request (SMR) Form (Office of Management and Budget #0970–0561, expiration February 29, 2024). Revisions are proposed to the currently approved form.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork

Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing infocollection@acf.hhs.gov. Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:
Description: ACF’s ORR places unaccompanied children in their custody in care provider programs until unification with a qualified sponsor. Care provider programs are required to provide children with a range of services including medical, dental, and mental healthcare. Children identified as having a serious medical or dental condition may require a procedure while in ORR custody to maintain and promote their health and wellbeing. Procedures requiring general anesthesia, surgeries, and invasive diagnostic procedures (e.g., cardiac catheterization, invasive biopsy, amniocentesis) require advance ORR approval. Before ORR can approve, data must be collected on the SMR form and submitted to ORR by the care provider program (e.g., care provider program’s contact information, child demographics, authorized consent, unification status) and the lead surgeon (e.g., reason for the procedure, potential risks/ complications/adverse outcomes if the procedure is not performed, timing, recovery timeframe, planned follow-up procedures, hospital points of contact).

ORR will waive the completion of the SMR form if it is deemed to be in the best interest of the child (e.g., during a hospitalization or emergency department visit, related to a medical emergency).

The form is used as a worksheet for care provider program staff and surgeons to compile information that would otherwise have been collected during the health evaluation. Once completed, care provider program staff upload the form and supporting documentation into ORR’s secure, electronic data record system and send an email notification to ORR staff that the SMR packet is ready for review.

ORR has incorporated changes to the form to streamline the flow of data collection, clarify intent and purpose of the form and fields, improve data quality, and ensure alignment with ORR program policies. The overall estimated time per form has increased by 1 minute and has been adjusted to reflect a decrease by 1 minute for care provider program staff and an increase by 2 minutes for surgeons.

Respondents: Care provider program staff, surgeons.

Annual Burden Estimates

There are currently about 250 programs that use the SMR form. Over the past 2 years, an annual average of 115 SMR forms were submitted across all programs. For each form, a care provider program staff member completes page 1, and a surgeon completes pages 2 and 3.

ESTIMATED REPORTING TIME FOR RESPONDENTS						
Instrument	Respondent	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
SMR Form	Care Provider Program Staff.	250	1.38	.07	24.15	8
	Surgeons	250	1.38	.17	58.65	20
Total Annual Burden Estimate.	.....	.....	.....	.....	.....	28

ESTIMATED RECORDKEEPING TIME

Instrument	Respondent	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
SMR Form	Care Provider Program Staff	250	1.38	.08	27.6	9

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 6 U.S.C 279; Exhibit 1, part A.2 of the Flores Settlement Agreement (*Jenny Lisette Flores, et al., v. Janet Reno*, Attorney General of the United States, et al., Case No. CV 85–4544–RJK [C.D. Cal. 1996])

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–19795 Filed 9–12–23; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–P–0558]

Determination That Oxandrin (Oxandrolone) Tablets, 2.5 Milligrams and 10 Milligrams, Were Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) has determined that Oxandrin (oxandrolone) tablets, 2.5 milligrams (mg) and 10 mg, were withdrawn from sale for reasons of safety or effectiveness. The Agency will not accept or approve abbreviated new drug applications (ANDAs) for Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg. **FOR FURTHER INFORMATION CONTACT:** Alexandria Fujisaki, Center for Drug

Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6222, Silver Spring, MD 20993–0002, 301–796–3600, Alexandria.Fujisaki@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved, and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the “Approved Drug Products With Therapeutic Equivalence Evaluations,” which is known generally as the “Orange Book.” Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug’s NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (§ 314.162 (21 CFR 314.162)).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

The anabolic steroid Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, is the subject of NDA 013718, held by Gemini Laboratories LLC (Gemini), and initially approved on July 21, 1964 (for the 2.5 mg strength) and November 5,

2001 (for the 10 mg strength). Oxandrin is indicated as follows: “as adjunctive therapy to promote weight gain after weight loss following extensive surgery, chronic infections, or severe trauma, and in some patients who without definite pathophysiologic reasons fail to gain or to maintain normal weight, to offset the protein catabolism associated with prolonged administration of corticosteroids, and for the relief of the bone pain frequently accompanying osteoporosis.”¹

In a letter dated March 26, 2019, Gemini requested that FDA withdraw approval of NDA 013718 for Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, under § 314.150(c) (21 CFR 314.150(c)), stating that the product was no longer being marketed. Subsequently, on December 16, 2022, FDA notified Gemini that the Agency believes a potential problem associated with oxandrolone tablets is sufficiently serious that the drug product should be removed from the market, and to enable withdrawal of approval of its application under § 314.150(d). After FDA notified Gemini that it believes the potential problems associated with the drug are sufficiently serious that the drug should be removed from the market pursuant to § 314.150(d), Gemini requested in a letter dated December 19, 2022, that FDA withdraw approval of NDA 013718 for Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg under § 314.150(d). In the **Federal Register** of June 28, 2023 (88 FR 41970), FDA announced that it was withdrawing approval of NDA 013718, effective June 28, 2023.

Novitium Pharma LLC submitted a citizen petition dated April 6, 2022 (Docket No. FDA–2022–P–0558), under 21 CFR 10.30, requesting that the Agency determine whether Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, were withdrawn from sale for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg,

¹ See Oxandrin (oxandrolone) tablets product labeling (NDA 013718, supplement 023), approved on June 20, 2005, available at https://www.accessdata.fda.gov/drugsatfda_docs/label/2005/013718s023lbl.pdf.

were withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, were withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events.

Our records show that FDA's Endocrinologic and Metabolic Drugs Advisory Committee met and discussed anabolic steroids in January 1984. The advisory committee unanimously concluded that there was no evidence of efficacy for oxandrolone.²

As communicated in the product labeling for Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, multiple safety warnings and precautions are associated with the use of this product including peliosis hepatis, sometimes associated with liver failure and intra-abdominal hemorrhage; liver cell tumors, sometimes fatal; and blood lipid changes that are known to be associated with increased risk of atherosclerosis.³ Per the product labeling, additional warnings with using this product include the risks associated with cholestatic hepatitis, hypercalcemia in patients with breast cancer, and increased risk for the development of prostatic hypertrophy and prostatic carcinoma in geriatric patients.⁴ Considering the safety concerns associated with the use of oxandrolone noted in the labeling, the Agency concluded that the benefit-risk profile of the drug product is unfavorable without substantial evidence to support effectiveness.

Based on a thorough evaluation of the information we have available to us and an evaluation of the latest version of the drug products' approved labeling, we have determined that the drug products would not be considered safe and effective if they were reintroduced to the market today. New clinical studies would first need to be conducted to address the concerns described above. Thus, after considering the citizen petition and reviewing Agency records and based on the information we have

at this time, FDA has determined under § 314.161 that Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, were withdrawn for reasons of safety or effectiveness. Accordingly, the Agency will remove Oxandrin (oxandrolone) tablets, 2.5 mg and 10 mg, from the list of drug products published in the Orange Book per § 314.162. FDA will not accept or approve ANDAs that refer to this drug product.

Dated: September 8, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-19796 Filed 9-12-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Kotha Subbaramaiah, Ph.D. (Respondent), who was a Professor of Biochemistry Research in Medicine, Department of Medicine, Weill Cornell Medical College (WCMC). Respondent engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Cancer Institute (NCI), National Institutes of Health (NIH), grants P01 CA077839, P01 CA106451, R01 CA108773, R01 CA154481, T32 CA009685, R25 CA105012, and N01 CN43302, National Institute on Deafness and Other Communication Disorders (NIDCD), NIH, grant T32 DC000027, and National Center for Advancing Translational Sciences (NCATS), NIH, grant UL1 TR000457. The administrative actions, including debarment for a period of seven (7) years, were implemented beginning on August 16, 2023, and are detailed below.

FOR FURTHER INFORMATION CONTACT:

Sheila Garrity, JD, MPH, MBA, Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453-8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Kotha Subbaramaiah, Ph.D., Weill Cornell Medical College: Based on the report of an investigation conducted by WCMC and additional analysis conducted by ORI in its oversight

review, ORI found that Kotha Subbaramaiah, Ph.D., former Weill Cornell Medical College, WCMC, engaged in research misconduct in research supported by PHS funds, specifically NCI, NIH, grants P01 CA077839, P01 CA106451, R01 CA108773, R01 CA154481, T32 CA009685, R25 CA105012, and N01 CN43302, NIDCD, NIH, grant T32 DC000027, and NCATS, NIH, grant UL1 TR000457.

ORI found that Respondent engaged in research misconduct by intentionally, knowingly, or recklessly falsifying and/or fabricating data included in the following twelve (12) published papers:

- Increased levels of COX-2 and prostaglandin E2 contribute to elevated aromatase expression in inflamed breast tissue of obese women. *Cancer Discov.* 2012 Apr;2(4):356-65. doi: 10.1158/2159-8290.CD-11-0241 (hereafter referred to as "*Cancer Discov.* 2012"). Retraction in: *Cancer Discov.* 2021 May;11(5):1306. doi: 10.1158/2159-8290.CD-21-0224.

- EP2 and EP4 receptors regulate aromatase expression in human adipocytes and breast cancer cells. Evidence of a BRCA1 and p300 exchange. *J Biol Chem.* 2008 Feb 8;283(6):3433-44. doi: 10.1074/jbc.M705409200 (hereafter referred to as "*J Biol Chem.* 2008"). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):295. doi: 10.1074/jbc.W119.012140.

- HDAC6 modulates Hsp90 chaperone activity and regulates activation of aryl hydrocarbon receptor signaling. *J Biol Chem.* 2009 Mar 20; 284(12):7436-45. doi: 10.1074/jbc.M808999200 (hereafter referred to as "*J Biol Chem.* 2009"). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):297. doi: 10.1074/jbc.W119.012142.

- p53 protein regulates Hsp90 ATPase activity and thereby Wnt signaling by modulating Aha1 expression. *J Biol Chem.* 2014 Mar 7;289(10):6513-25. doi: 10.1074/jbc.M113.532523 (hereafter referred to as "*J Biol Chem.* 2014"). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):289. doi: 10.1074/jbc.W119.012134.

- Hsp90 and PKM2 drive the expression of aromatase in Li-Fraumeni syndrome breast adipose stromal cells. *J Biol Chem.* 2016 Jul 29;291(31):16011-23. doi: 10.1074/jbc.M115.698902 (hereafter referred to as "*J Biol Chem.* 2016"). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):290. doi: 10.1074/jbc.W119.012135.

- Heat shock protein 90 inhibitors suppress aryl hydrocarbon receptor-mediated activation of CYP1A1 and CYP1B1 transcription and DNA adduct formation. *Cancer Prev Res (Phila).* 2008

² See minutes from the January 24 to 25, 1984, advisory committee meeting discussing anabolic steroids, at pg. 7.

³ See footnote 1.

⁴ See footnote 1.

Nov;1(6):485–93. doi: 10.1158/1940–6207.CAPR–08–0149 (hereafter referred to as “*Cancer Prev Res.* 2008”).

Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2;15(6):415. doi: 10.1158/1940–6207.CAPR–22–0200.

- Obesity is associated with inflammation and elevated aromatase expression in the mouse mammary gland. *Cancer Prev Res* (Phila). 2011 Mar;4(3):329–46. doi: 10.1158/1940–6207.CAPR–10–0381 (hereafter referred to as “*Cancer Prev Res.* 2011”). Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2; 15(6):413. doi: 10.1158/1940–6207.CAPR–22–0202.

- Carnosol, a constituent of Zyflamend, inhibits aryl hydrocarbon receptor-mediated activation of CYP1A1 and CYP1B1 transcription and mutagenesis. *Cancer Prev Res* (Phila). 2012 Apr;5(4):593–602. doi: 10.1158/1940–6207.CAPR–12–0002 (hereafter referred to as “*Cancer Prev Res.* 2012a”). Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2;15(6):412. doi: 10.1158/1940–6207.CAPR–22–0203.

- Pioglitazone, a PPAR γ agonist, suppresses CYP19 transcription: evidence for involvement of 15-hydroxyprostaglandin dehydrogenase and BRCA1. *Cancer Prev Res* (Phila). 2012 Oct;5(10):1183–94. doi: 10.1158/1940–6207.CAPR–12–0201 (hereafter referred to as “*Cancer Prev Res.* 2012b”). Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2;15(6):411. doi: 10.1158/1940–6207.CAPR–22–0204.

- Caloric restriction reverses obesity-induced mammary gland inflammation in mice. *Cancer Prev Res* (Phila). 2013 Apr;6(4):282–9. doi: 10.1158/1940–6207.CAPR–12–0467 (hereafter referred to as “*Cancer Prev Res.* 2013”). Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2; 15(6):410. doi: 10.1158/1940–6207.CAPR–22–0205.

- p53 modulates Hsp90 ATPase activity and regulates aryl hydrocarbon receptor signaling. *Cancer Prev Res* (Phila). 2014 Jun;7(6):596–606. doi: 10.1158/1940–6207.CAPR–14–0051 (hereafter referred to as “*Cancer Prev Res.* 2014”). Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2;15(6):408. doi: 10.1158/1940–6207.CAPR–22–0207.

- Id1 deficiency protects against tumor formation in Apc(Min/+) mice but not in a mouse model of colitis-associated colon cancer. *Cancer Prev Res* (Phila). 2015 Apr;8(4):303–11. doi: 10.1158/1940–6207.CAPR–14–0411 (hereafter referred to as “*Cancer Prev Res.* 2015”). Retraction in: *Cancer Prev Res* (Phila). 2022 Jun 2;15(6):407. doi: 10.1158/1940–6207.CAPR–22–0208.

Specifically, ORI found that Respondent reused Western blot images from the same source and falsely

re-labeled them to represent different proteins and/or experimental results in:

- Cancer Discov.* 2012:

- Figure 2B, β -Actin panel, representing β -Actin expression in inflamed breast tissue with different levels of inflammation:

- All lanes are duplicated by reusing a same source band with manipulation

- Figure 4C, representing the expression of progesterone receptor (PR) and β -Actin in inflamed breast tissue with different levels of inflammation:

- PR panel: Lanes 1, 2, and 14–16 are duplicated by reusing a same source band with manipulation; lanes 3, 6–9, 13, and 17 are duplicated by reusing a same source band with manipulation

- β -Actin panel: All lanes are duplicated by reusing a same source band with manipulation

- Figure 5H, β -Actin panel, representing β -Actin expression in macrophages with different treatments:

- Lane 2 and lane 4 are identical

- J Biol Chem* 2008

- Figure 2B, lanes 1–3, aromatase panel, representing aromatase expression in adipocytes treated with PGE1 alcohol, and Figure 2E, lanes 2–4, Aromatase panel, representing aromatase expression in adipocytes treated with PGE₂ with or without ONO, are duplicated by reusing the same source images with manipulation

- Figure 3B, 18S rRNA panel, representing 18S rRNA expression in adipocytes with different treatments:

- Lanes 2 and 6 are identical

- Lanes 3 and 7 are identical

- Figure 5A, 18S rRNA panel, representing 18S rRNA expression in adipocytes treated with different doses of PGE₂:

- Lanes 1 and 5 are identical

- Lanes 2 and 6 are identical

- Figure 5B, β -actin panel, representing β -actin expression in adipocytes treated with different doses of PGE₂:

- Lanes 1, 3, and 4 are identical

- Figure 6D, BRCA1 and Aromatase panels, representing expression of both BRCA1 and aromatase in SKBR3 cells treated with different doses of PGE1 alcohol:

- Lanes 3–4, BRCA1 panel and lanes 1–2, Aromatase panel are duplicated by reusing the same source images with manipulation

- Figure 5A, BRCA1 panel, representing BRCA1 expression in adipocytes treated with different doses of PGE₂:

- Lanes 3–6 are falsified and/or fabricated

- Figure 5C, 18S rRNA panel, representing 18S rRNA expression in adipocytes treated with different doses of butaprost:

- Entire 18S rRNA panel is falsified and/or fabricated

- Figure 5E:

- Lane 4, BRCA1 panel and lane 1, 18S rRNA panel are identical

- Figures 6C, 6D, 6E, and 6F:

- Images used in the following figures are duplicated by reusing the same source images with manipulation:

- Figure 6C, lane 1, BRCA1 panel, representing BRCA1 expression in control sample without treatment of butaprost

- Figure 6C, lane 3, Aromatase panel, representing aromatase expression with 0.25 μ M butaprost treatment

- Figure 6D, lane 1, BRCA1 panel, representing BRCA1 expression in control sample without treatment of PGE1 alcohol

- Figure 6F, lane 1, BRCA1 panel, representing BRCA1 expression in control sample without treatment of PGE₂ and ONO

- Images used in the following figures are duplicated by reusing the same source images with manipulation:

- Figure 6C, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with 0.10 μ M butaprost

- Figure 6D, lane 3, Aromatase panel, representing aromatase expression in sample treated with 0.25 μ M PGE1 alcohol

- Images used in the following figures are duplicated by reusing the same source images with manipulation:

- Figure 6C, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with 0.25 μ M butaprost

- Figure 6D, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with 0.25 μ M PGE1 alcohol

- Figure 6D, lane 2, Aromatase panel, representing aromatase expression in sample treated with 0.10 μ M PGE1 alcohol

- Images used in the following figures are duplicated by reusing the same source images with manipulation:

- Figure 6C, lane 4, BRCA1 panel, representing BRCA1 expression in sample treated with 0.50 μ M butaprost

- Figure 6C, lane 1, Aromatase panel, representing aromatase expression in control sample without treatment of butaprost

- Figure 6D, lane 1, Aromatase panel, representing aromatase expression in control sample without treatment of PGE1 alcohol

- Figure 6E, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ without AH6809

■ Images used in the following figures are duplicated by reusing the same source images with manipulation:

➤ Figure 6C, lane 2, Aromatase panel, representing aromatase expression in sample treated with 0.10 μ M butaprost

➤ Figure 6E, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ and 25 μ M AH6809

➤ Figure 6F, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ but without ONO

■ Images used in the following figures are duplicated by reusing the same source images with manipulation:

➤ Figure 6C, lane 4, Aromatase panel, representing aromatase expression in sample treated with 0.50 μ M butaprost

➤ Figure 6D, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with 0.10 μ M PGE1 alcohol

➤ Figure 6E, lane 4, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ and 50 μ M AH6809

➤ Figure 6F, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ and 0.10 μ M ONO

■ Images used in the following figures are duplicated by reusing the same source images with manipulation:

➤ Figure 6D, 18S rRNA panel, representing 18S rRNA expression in samples treated with different doses of PGE1 alcohol

➤ Figure 6F, 18S rRNA panel, representing 18S rRNA expression in samples treated with different doses of PGE₂ and ONO

• *J Biol Chem.* 2009:

—Figures 2A and 2B, β -actin panels, representing β -actin expression in KYSE450 cells and MSK-Leuk1 cells, respectively:

■ The two panels are identical

—Figure 3B, representing protein expression at two different time points:

■ Column 4, 1-hour panel, and column 2, 3-hour panel, are duplicated by reusing the same source images with resizing

—Figure 6H, representing expression of different proteins with different treatments:

■ Column 1, Control group and column 3, Control siRNA group are identical

—Figure 6I, representing expression of different proteins with different treatments:

■ Lanes 2 and 5, column 1 are identical

■ Lane 3, column 1 and lane 5, column 2 are identical

—Figure 8G, Input panel, representing input protein expression in A549 cells with different treatments:

■ Lanes 2 and 3 are identical

—Figure 9B, Input panel, representing input protein expression in different samples:

■ Lanes 2 and 3 are identical

—Figures 8E and 9D:

■ Images used in the following figures are duplicated by reusing a same source band with resizing:

➤ Figure 8E, lane 2, AhR panel, representing AhR expression in sample treated with B[a]P

➤ Figure 9D, lane 3, β -actin panel, representing β -actin expression in K/R sample treated with TS

—Figure 9D, β -actin panel, representing β -actin expression under different experimental conditions:

■ Lane 1 is falsified and/or fabricated

—Figure 9C, Input panel, representing input protein expression in K/A sample:

■ Lane 5 is falsified and/or fabricated

—Figure S1A, p23 panel, representing p23 expression in MSK-Leuk1 cells and A549 cells:

■ Lanes 1 and 2 are identical

—Figure S1C, XAP-2 panel, representing XAP-2 expression in control and sample treated with HDAC6 KD:

■ Lanes 1 and 2 are identical

—Figure S1B, representing expression of different proteins in MSK-Leuk1 cells with different treatments:

■ Lanes 3 and 4, Hsp90 panel are identical

■ Lanes 1 and 2, AhR panel are identical

■ Lanes 1 and 2, β -actin panel are identical

■ Lanes 3 and 4, β -actin panel are identical

—Figure S1E, representing expression of different proteins in MSK-Leuk1 cells with different treatments:

■ Lane 1, Hsp90 panel, and lanes 1 and 2, HDAC6 panel, are identical

■ Lane 3, Hsp90 panel, and lane 3, XAP-2 panel, are identical

—Figure S2, representing expression of different proteins in MSK-Leuk1 cells with different treatments:

■ Last lane, IB AcK panel, and lanes 3 and 5, IB HSP90 panel, are duplicated with resizing

■ Lane 4, IB AcK panel, and lanes 1, 4, and 6, IB HSP90 panel, are duplicated with resizing

■ Lane 4, IB AcK panel, is falsified and/or fabricated

• *J Biol Chem.* 2014:

—Figure 1D, representing expression of different proteins treated with control or p53 siRNA:

■ Lane 1, p53 panel, and lanes 1 and 2, β -actin panel, are duplicated by reusing a same source band with manipulation

—Figure 2B, β -actin panel, representing β -actin expression in HCT-15 cells treated with different doses of CP-31398:

■ Lane 1 and lane 5 are identical

■ Lane 2 and lane 6 are identical

—Figure 4K, p23 panel, representing p23 expression in samples treated with different doses of CP-31398 in HCT-15 cells:

■ Lanes 2-4 are identical

—Figures 4H, 4I, and 4L, β -actin panels, representing β -actin expression under different experimental conditions:

■ β -actin panels in Figures 4H and 4I, and lanes 3-4, β -actin panel in Figure 4L are duplicated by reusing the same source images with manipulation

—Figures 4J, 4K, and 4L, representing expression of HOP (Figure 4J) and β -actin (Figures 4K and 4L) under different experimental conditions:

■ Lanes 1-2, HOP panel in Figure 4J, lanes 3-4, β -actin panel in Figure 4K, and lanes 1-2, β -actin panel in Figure 4L are duplicated by reusing the same source images with manipulation

—Figures 5A and 5B, β -actin panels, representing β -actin expression in both HCT-15 cells and EB-1 cells, are identical

—Figure 5H, c-Myc panel and Naked-1 panel, representing expression of c-Myc and Naked-1 in EB-1 cells, are duplicated with resizing

—Figures 10A and 10B, representing β -actin (Figure 10A) and Aha1 (Figure 10B) expression:

■ Lanes 2-3, β -actin panel in Figure 10A and lanes 2-3, Aha1 panel in Figure 10B are duplicated with resizing

• *J Biol Chem.* 2016:

—Figures 1C and 7A, β -actin panels, representing β -actin expression in different cells:

■ Lanes 1-2, β -actin panel in Figure 1C and lanes 2-3, β -actin panel in Figure 7A are duplicated by reusing the same source images with manipulation

—Figure 5B, representing expression of different proteins with different treatments:

■ Lane 6, PKM2 panel, and lane 5, Hsp90 panel, are identical

—Figure 5A, representing expression of different proteins with different treatments:

■ Lane 2, HIF-1 α panel, and lane 1, β -actin panel, are identical

• *Cancer Prev Res.* 2008:

—Figure 2B, β -actin panel, representing β -actin expression in different cells with different treatments:

- Left middle β -actin panel and right middle β -actin panel are duplicated by reusing the same source images with manipulation

—Figures 3A and 3B, β -actin panels, representing β -actin expression in different cells with different treatments:

- Left top β -actin panel in Figure 3A and left top β -actin panel in Figure 3B are identical

- Right top β -actin panel in Figure 3A and left bottom β -actin panel in Figure 3B are duplicated by reusing the same source images with manipulation

- Right bottom β -actin panel in Figure 3A and right bottom β -actin panel in Figure 3B are identical

- *Cancer Prev Res.* 2011:

—Figure 3A, representing expression of different proteins with different treatments:

- Lane 1, aP2 panel, is falsified and/or fabricated
- Lanes 3 and 5, aP2 panel, and lanes 1–6, 18S rRNA panel, are identical

- *Cancer Prev Res.* 2012a:

—Figure 4A, representing input expression treated with different doses of Zylflamend with or without 17–AAG:

- Lanes 1–5 are identical
- Lanes 6–7 are identical

—Figure 4B, representing input expression treated with different doses of carnosol with or without 17–AAG:

- Lanes 1–5 are identical
- *Cancer Prev Res.* 2012b:

—Figure 2, representing expression of different proteins under different experimental conditions:

- Lane 1, 15–PGDH panel in Figure 2B and lanes 3–4, β -Actin panel in Figure 2E are duplicated by reusing a same source band with manipulation

- Lane 2, β -Actin panel in Figure 2B and lane 1, Snail panel in Figure 2E are duplicated by reusing a same source band with manipulation

- Lane 3, Snail panel in Figure 2G and lane 1, 15–PGDH panel in Figure 2H are duplicated by reusing a same source band with manipulation

- Lanes 1 and 2, β -Actin panel in Figure 2H are duplicated by reusing a same source band with manipulation

- Lanes 1–3, β -Actin panel in Figure 2J and lanes 1–2, β -Actin panel in Figure 2K are duplicated by reusing a same source band with manipulation

—Figure 4E, β -Actin panel, representing β -actin expression in control and pioglitazone samples:

- Lanes 1 and 2 are identical
- *Cancer Prev Res.* 2013:

—Figure 3, representing binding of nuclear protein from mammary glands of mice with different treatments:

- Lanes 7–9 (first three empty lanes are counted also) and lanes 13–15 are identical

- *Cancer Prev Res.* 2014:

—Figures 5A and 5C, representing expression of different proteins with different treatments:

- Lanes 2–3, CYP1A1 panel, and lanes 2–3, CYP1B1 panel, in Figure 5A and lane 3, CYP1B1 panel, in Figure 5C are duplicated by reusing a same source band with manipulation

—Figure 5B, β -actin panel, representing β -actin expression in different cells with different treatments:

- Lanes 2–4 are identical

—Figure 5D, β -actin panel, representing β -actin expression in different cells with different treatments:

- Lanes 1–4 are duplicated by reusing a same source band with manipulation

- *Cancer Prev Res.* 2015:

—Figure 3A, β -actin panel, representing β -actin expression in DLD–1 treated with different doses of PGE₂:

- Lanes 1, 3, and 5 are identical
- Lanes 2 and 4 are identical

Respondent entered into a Voluntary Exclusion Agreement (Agreement) and voluntarily agreed to the following:

(1) Respondent will exclude himself voluntarily for a period of seven (7) years beginning on August 16, 2023 (the “Exclusion Period”), from any contracting or subcontracting with any agency of the United States Government and from eligibility for or involvement in nonprocurement or procurement transactions referred to as “covered transactions” in 2 CFR parts 180 and 376 (collectively the “Debarment Regulations”).

(2) During the Exclusion Period, Respondent will exclude himself voluntarily from serving in any advisory or consultant capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee.

Dated: September 8, 2023.

Sheila Garrity,

Director, Office of Research Integrity, Office of the Assistant Secretary for Health.

[FR Doc. 2023–19780 Filed 9–12–23; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Andrew Dannenberg, M.D. (Respondent), who was a Professor of Medicine, Department of Medicine, Weill Cornell Medical College (WCMC). Respondent engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Cancer Institute (NCI), National Institutes of Health (NIH), grants P01 CA077839, P01 CA106451, R01 CA108773, R01 CA154481, T32 CA009685, R25 CA105012, and N01 CN43302, National Institute on Deafness and Other Communication Disorders (NIDCD), NIH, grant T32 DC000027, and National Center for Advancing Translational Sciences (NCATS), NIH, grant UL1 TR000457. The administrative actions, including supervision for a period of seven (7) years, were implemented beginning on August 14, 2023, and are detailed below.

FOR FURTHER INFORMATION CONTACT:

Sheila Garrity, JD, MPH, MBA, Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Andrew Dannenberg, M.D., Weill Cornell Medical College (WCMC): Based on the report of an investigation conducted by WCMC and additional analysis conducted by ORI in its oversight review, ORI found that Andrew Dannenberg, former Professor of Medicine, Department of Medicine, WCMC, engaged in research misconduct in research supported by PHS funds, specifically NCI, NIH, grants P01 CA077839, P01 CA106451, R01 CA108773, R01 CA154481, T32 CA009685, R25 CA105012, and N01 CN43302, NIDCD, NIH, grant T32 DC000027, and NCATS, NIH, grant UL1 TR000457.

ORI found that Respondent engaged in research misconduct by recklessly reporting falsified and/or fabricated data in the following twelve (12) published papers:

- Increased levels of COX–2 and prostaglandin E2 contribute to elevated aromatase expression in inflamed breast tissue of obese women. *Cancer Discov.* 2012 Apr;2(4):356–65. doi: 10.1158/2159–8290.CD–11–0241 (hereafter referred to as “*Cancer Discov.* 2012”). Retraction in: *Cancer Discov.* 2021 May;11(5):1306. doi: 10.1158/2159–8290.CD–21–0224.

- EP2 and EP4 receptors regulate aromatase expression in human

adipocytes and breast cancer cells. Evidence of a BRCA1 and p300 exchange. *J Biol Chem.* 2008 Feb 8;283(6):3433–44. doi: 10.1074/jbc.M705409200 (hereafter referred to as “*J Biol Chem.* 2008”). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):295. doi: 10.1074/jbc.W119.012140.

- HDAC6 modulates Hsp90 chaperone activity and regulates activation of aryl hydrocarbon receptor signaling. *J Biol Chem.* 2009 Mar 20; 284(12):7436–45. doi: 10.1074/jbc.M808999200 (hereafter referred to as “*J Biol Chem.* 2009”). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):297. doi: 10.1074/jbc.W119.012142.

- p53 protein regulates Hsp90 ATPase activity and thereby Wnt signaling by modulating Aha1 expression. *J Biol Chem.* 2014 Mar 7;289(10):6513–25. doi: 10.1074/jbc.M113.532523 (hereafter referred to as “*J Biol Chem.* 2014”). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):289. doi: 10.1074/jbc.W119.012134.

- Hsp90 and PKM2 drive the expression of aromatase in Li-Fraumeni syndrome breast adipose stromal cells. *J Biol Chem.* 2016 Jul 29;291(31):16011–23. doi: 10.1074/jbc.M115.698902 (hereafter referred to as “*J Biol Chem.* 2016”). Retraction in: *J Biol Chem.* 2020 Jan 3; 295(1):290. doi: 10.1074/jbc.W119.012135.

- Heat shock protein 90 inhibitors suppress aryl hydrocarbon receptor-mediated activation of CYP1A1 and CYP1B1 transcription and DNA adduct formation. *Cancer Prev Res (Phila).* 2008 Nov;1(6):485–93. doi: 10.1158/1940-6207.CAPR-08-0149 (hereafter referred to as “*Cancer Prev Res.* 2008”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2;15(6):415. doi: 10.1158/1940-6207.CAPR-22-0200.

- Obesity is associated with inflammation and elevated aromatase expression in the mouse mammary gland. *Cancer Prev Res (Phila).* 2011 Mar;4(3):329–46. doi: 10.1158/1940-6207.CAPR-10-0381 (hereafter referred to as “*Cancer Prev Res.* 2011”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2; 15(6):413. doi: 10.1158/1940-6207.CAPR-22-0202.

- Carnosol, a constituent of Zyflamend, inhibits aryl hydrocarbon receptor-mediated activation of CYP1A1 and CYP1B1 transcription and mutagenesis. *Cancer Prev Res (Phila).* 2012 Apr;5(4):593–602. doi: 10.1158/1940-6207.CAPR-12-0002 (hereafter referred to as “*Cancer Prev Res.* 2012a”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2;15(6):412. doi: 10.1158/1940-6207.CAPR-22-0203.

- Pioglitazone, a PPAR γ agonist, suppresses CYP19 transcription:

evidence for involvement of 15-hydroxyprostaglandin dehydrogenase and BRCA1. *Cancer Prev Res (Phila).* 2012 Oct;5(10):1183–94. doi: 10.1158/1940-6207.CAPR-12-0201 (hereafter referred to as “*Cancer Prev Res.* 2012b”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2;15(6):411. doi: 10.1158/1940-6207.CAPR-22-0204.

- Caloric restriction reverses obesity-induced mammary gland inflammation in mice. *Cancer Prev Res (Phila).* 2013 Apr;6(4):282–9. doi: 10.1158/1940-6207.CAPR-12-0467 (hereafter referred to as “*Cancer Prev Res.* 2013”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2; 15(6):410. doi: 10.1158/1940-6207.CAPR-22-0205.

- p53 modulates Hsp90 ATPase activity and regulates aryl hydrocarbon receptor signaling. *Cancer Prev Res (Phila).* 2014 Jun;7(6):596–606. doi: 10.1158/1940-6207.CAPR-14-0051 (hereafter referred to as “*Cancer Prev Res.* 2014”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2;15(6):408. doi: 10.1158/1940-6207.CAPR-22-0207.

- Id1 deficiency protects against tumor formation in Apc(Min/+) mice but not in a mouse model of colitis-associated colon cancer. *Cancer Prev Res (Phila).* 2015 Apr;8(4):303–11. doi: 10.1158/1940-6207.CAPR-14-0411 (hereafter referred to as “*Cancer Prev Res.* 2015”). Retraction in: *Cancer Prev Res (Phila).* 2022 Jun 2;15(6):407. doi: 10.1158/1940-6207.CAPR-22-0208.

Respondent recklessly reported falsified and/or fabricated Western blot image data that were reused, with or without manipulation to conceal their similarities, and falsely relabeled as data representing different experiments or proteins in sixty (60) figure panels included in twelve (12) published papers. In the absence of reliable image and numerical data, the figures, statistical analyses, and related text also are false.

Specifically, Respondent reported Western blot images that were reused from the same source and falsely relabeled to represent different proteins and/or experimental results in:

- *Cancer Discov.* 2012:

- Figure 2B, β -Actin panel, representing β -Actin expression in inflamed breast tissue with different levels of inflammation:

- All lanes are duplicated by reusing a same source band with manipulation

- Figure 4C, representing the expression of progesterone receptor (PR) and β -Actin in inflamed breast tissue with different levels of inflammation:

- PR panel: Lanes 1, 2, and 14–16 are duplicated by reusing a same source

band with manipulation; lanes 3, 6–9, 13, and 17 are duplicated by reusing a same source band with manipulation

- β -Actin panel: All lanes are duplicated by reusing a same source band with manipulation

- Figure 5H, β -Actin panel, representing β -Actin expression in macrophages with different treatments:

- Lane 2 and lane 4 are identical

- *J Biol Chem.* 2008:

- Figure 2B, lanes 1–3, Aromatase panel, representing aromatase expression in adipocytes treated with PGE1 alcohol, and Figure 2E, lanes 2–4, Aromatase panel, representing aromatase expression in adipocytes treated with PGE₂ with or without ONO, are duplicated by reusing the same source images with manipulation

- Figure 3B, 18S rRNA panel, representing 18S rRNA expression in adipocytes with different treatments:

- Lanes 2 and 6 are identical

- Lanes 3 and 7 are identical

- Figure 5A, 18S rRNA panel, representing 18S rRNA expression in adipocytes treated with different doses of PGE₂:

- Lanes 1 and 5 are identical

- Lanes 2 and 6 are identical

- Figure 5B, β -actin panel, representing β -actin expression in adipocytes treated with different doses of PGE₂:

- Lanes 1, 3, and 4 are identical

- Figure 6D, BRCA1 and Aromatase panels, representing expression of both BRCA1 and aromatase in SKBR3 cells treated with different doses of PGE1 alcohol:

- Lanes 3–4, BRCA1 panel and lanes 1–2, Aromatase panel are duplicated by reusing the same source images with manipulation

- Figure 5A, BRCA1 panel, representing BRCA1 expression in adipocytes treated with different doses of PGE₂:

- Lanes 3–6 are falsified and/or fabricated

- Figure 5C, 18S rRNA panel, representing 18S rRNA expression in adipocytes treated with different doses of butaprost:

- Entire 18S rRNA panel is falsified and/or fabricated

- Figure 5E:

- Lane 4, BRCA1 panel and lane 1, 18S rRNA panel are identical

- Figures 6C, 6D, 6E, and 6F:

- Images used in the following figures are duplicated by reusing the same source images with manipulation:

- Figure 6C, lane 1, BRCA1 panel, representing BRCA1 expression in control sample without treatment of butaprost

- Figure 6C, lane 3, Aromatase panel, representing aromatase expression with 0.25 μ M butaprost treatment
- Figure 6D, lane 1, BRCA1 panel, representing BRCA1 expression in control sample without treatment of PGE1 alcohol
- Figure 6F, lane 1, BRCA1 panel, representing BRCA1 expression in control sample without treatment of PGE₂ and ONO
- Images used in the following figures are duplicated by reusing the same source images with manipulation:
 - Figure 6C, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with 0.10 μ M butaprost
 - Figure 6D, lane 3, Aromatase panel, representing aromatase expression in sample treated with 0.25 μ M PGE1 alcohol
 - Images used in the following figures are duplicated by reusing the same source images with manipulation:
 - Figure 6C, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with 0.25 μ M butaprost
 - Figure 6D, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with 0.25 μ M PGE1 alcohol
 - Figure 6D, lane 2, Aromatase panel, representing aromatase expression in sample treated with 0.10 μ M PGE1 alcohol
 - Images used in the following figures are duplicated by reusing the same source images with manipulation:
 - Figure 6C, lane 4, BRCA1 panel, representing BRCA1 expression in sample treated with 0.50 μ M butaprost
 - Figure 6C, lane 1, Aromatase panel, representing aromatase expression in control sample without treatment of butaprost
 - Figure 6D, lane 1, Aromatase panel, representing aromatase expression in control sample without treatment of PGE1 alcohol
 - Figure 6E, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ without AH6809
 - Images used in the following figures are duplicated by reusing the same source images with manipulation:
 - Figure 6C, lane 2, Aromatase panel, representing aromatase expression in sample treated with 0.10 μ M butaprost
 - Figure 6E, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ and 25 μ M AH6809
 - Figure 6F, lane 2, BRCA1 panel, representing BRCA1 expression in
- sample treated with PGE₂ but without ONO
- Images used in the following figures are duplicated by reusing the same source images with manipulation:
 - Figure 6C, lane 4, Aromatase panel, representing aromatase expression in sample treated with 0.50 μ M butaprost
 - Figure 6D, lane 2, BRCA1 panel, representing BRCA1 expression in sample treated with 0.10 μ M PGE1 alcohol
 - Figure 6E, lane 4, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ and 50 μ M AH6809
 - Figure 6F, lane 3, BRCA1 panel, representing BRCA1 expression in sample treated with PGE₂ and 0.10 μ M ONO
 - Images used in the following figures are duplicated by reusing the same source images with manipulation:
 - Figure 6D, 18S rRNA panel, representing 18S rRNA expression in samples treated with different doses of PGE1 alcohol
 - Figure 6F, 18S rRNA panel, representing 18S rRNA expression in samples treated with different doses of PGE₂ and ONO
- *J Biol Chem.* 2009:
 - Figures 2A and 2B, β -actin panels, representing β -actin expression in KYSE450 cells and MSK-Leuk1 cells, respectively:
 - The two panels are identical
 - Figure 3B, representing protein expression at two different time points:
 - Column 4, 1-hour panel, and column 2, 3-hour panel, are duplicated by reusing the same source images with resizing
 - Figure 6H, representing expression of different proteins with different treatments:
 - Column 1, Control group and column 3, Control siRNA group are identical
 - Figure 6I, representing expression of different proteins with different treatments:
 - Lanes 2 and 5, column 1 are identical
 - Lane 3, column 1 and lane 5, column 2 are identical
 - Figure 8G, Input panel, representing input protein expression in A549 cells with different treatments:
 - Lanes 2 and 3 are identical
 - Figure 9B, Input panel, representing input protein expression in different samples:
 - Lanes 2 and 3 are identical
- Figures 8E and 9D:
 - Images used in the following figures are duplicated by reusing a same source band with resizing:
 - Figure 8E, lane 2, AhR panel, representing AhR expression in sample treated with B[a]P
 - Figure 9D, lane 3, β -actin panel, representing β -actin expression in K/R sample treated with TS
- Figure 9D, β -actin panel, representing β -actin expression under different experimental conditions:
 - Lane 1 is falsified and/or fabricated
- Figure 9C, Input panel, representing input protein expression in K/A sample:
 - Lane 5 is falsified and/or fabricated
- Figure S1A, p23 panel, representing p23 expression in MSK-Leuk1 cells and A549 cells:
 - Lanes 1 and 2 are identical
- Figure S1C, XAP-2 panel, representing XAP-2 expression in control and sample treated with HDAC6 KD:
 - Lanes 1 and 2 are identical
- Figure S1B, representing expression of different proteins in MSK-Leuk1 cells with different treatments:
 - Lanes 3 and 4, Hsp90 panel are identical
 - Lanes 1 and 2, AhR panel are identical
 - Lanes 1 and 2, β -actin panel are identical
 - Lanes 3 and 4, β -actin panel are identical
- Figure S1E, representing expression of different proteins in MSK-Leuk1 cells with different treatments:
 - Lane 1, Hsp90 panel, and lanes 1 and 2, HDAC6 panel, are identical
 - Lane 3, Hsp90 panel, and lane 3, XAP-2 panel, are identical
- Figure S2, representing expression of different proteins in MSK-Leuk1 cells with different treatments:
 - Last lane, IB AcK panel, and lanes 3 and 5, IB HSP90 panel, are duplicated with resizing
 - Lane 4, IB AcK panel, and lanes 1, 4, and 6, IB HSP90 panel, are duplicated with resizing
 - Lane 4, IB AcK panel, is falsified and/or fabricated
- *J Biol Chem.* 2014:
 - Figure 1D, representing expression of different proteins treated with control or p53 siRNA:
 - Lane 1, p53 panel, and lanes 1 and 2, β -actin panel, are duplicated by reusing a same source band with manipulation
 - Figure 2B, β -actin panel, representing β -actin expression in HCT-15 cells treated with different doses of CP-31398:
 - Lane 1 and lane 5 are identical
 - Lane 2 and lane 6 are identical
 - Figure 4K, p23 panel, representing p23 expression in samples treated

- with different doses of CP-31398 in HCT-15 cells:
- Lanes 2–4 are identical
- Figures 4H, 4I, and 4L, β -actin panels, representing β -actin expression under different experimental conditions:
- β -actin panels in Figures 4H and 4I, and lanes 3–4, β -actin panel in Figure 4L are duplicated by reusing the same source images with manipulation
- Figures 4J, 4K, and 4L, representing expression of HOP (Figure 4J) and β -actin (Figures 4K and 4L) under different experimental conditions:
- Lanes 1–2, HOP panel in Figure 4J, lanes 3–4, β -actin panel in Figure 4K, and lanes 1–2, β -actin panel in Figure 4L are duplicated by reusing the same source images with manipulation
- Figures 5A and 5B, β -actin panels, representing β -actin expression in both HCT-15 cells and EB-1 cells, are identical
- Figure 5H, c-Myc panel and Naked-1 panel, representing expression of c-Myc and Naked-1 in EB-1 cells, are duplicated with resizing
- Figures 10A and 10B, representing β -actin (Figure 10A) and Aha1 (Figure 10B) expression:
- Lanes 2–3, β -actin panel in Figure 10A and lanes 2–3, Aha1 panel in Figure 10B are duplicated with resizing
- *J Biol Chem*. 2016:
- Figures 1C and 7A, β -actin panels, representing β -actin expression in different cells:
- Lanes 1–2, β -actin panel in Figure 1C and lanes 2–3, β -actin panel in Figure 7A are duplicated by reusing the same source images with manipulation
- Figure 5B, representing expression of different proteins with different treatments:
- Lane 6, PKM2 panel, and lane 5, Hsp90 panel, are identical
- Figure 5A, representing expression of different proteins with different treatments:
- Lane 2, HIF-1 α panel, and lane 1, β -actin panel, are identical
- *Cancer Prev Res*. 2008:
- Figure 2B, β -actin panel, representing β -actin expression in different cells with different treatments:
- Left middle β -actin panel and right middle β -actin panel are duplicated by reusing the same source images with manipulation
- Figures 3A and 3B, β -actin panels, representing β -actin expression in different cells with different treatments:
- Left top β -actin panel in Figure 3A and left top β -actin panel in Figure 3B are identical
 - Right top β -actin panel in Figure 3A and left bottom β -actin panel in Figure 3B are duplicated by reusing the same source images with manipulation
 - Right bottom β -actin panel in Figure 3A and right bottom β -actin panel in Figure 3B are identical
- *Cancer Prev Res*. 2011:
- Figure 3A, representing expression of different proteins with different treatments:
- Lane 1, aP2 panel, is falsified and/or fabricated
 - Lanes 3 and 5, aP2 panel, and lanes 1–6, 18S rRNA panel, are identical
- *Cancer Prev Res*. 2012a:
- Figure 4A, representing input expression treated with different doses of Zylflamend with or without 17-AAG:
- Lanes 1–5 are identical
 - Lanes 6–7 are identical
- Figure 4B, representing input expression treated with different doses of carnosol with or without 17-AAG:
- Lanes 1–5 are identical
- *Cancer Prev Res*. 2012b:
- Figure 2, representing expression of different proteins under different experimental conditions:
- Lane 1, 15-PGDH panel in Figure 2B and lanes 3–4, β -Actin panel in Figure 2E are duplicated by reusing a same source band with manipulation
 - Lane 2, β -Actin panel in Figure 2B and lane 1, Snail panel in Figure 2E are duplicated by reusing a same source band with manipulation
 - Lane 3, Snail panel in Figure 2G and lane 1, 15-PGDH panel in Figure 2H are duplicated by reusing a same source band with manipulation
 - Lanes 1 and 2, β -Actin panel in Figure 2H are duplicated by reusing a same source band with manipulation
 - Lanes 1–3, β -Actin panel in Figure 2J and lanes 1–2, β -Actin panel in Figure 2K are duplicated by reusing a same source band with manipulation
- Figure 4E, β -Actin panel, representing β -actin expression in control and pioglitazone samples:
- Lanes 1 and 2 are identical
- *Cancer Prev Res*. 2013:
- Figure 3, representing binding of nuclear protein from mammary glands of mice with different treatments:
- Lanes 7–9 (first three empty lanes are counted also) and lanes 13–15 are identical
- *Cancer Prev Res*. 2014:
- Figures 5A and 5C, representing expression of different proteins with different treatments:
- Lanes 2–3, CYP1A1 panel, and lanes 2–3, CYP1B1 panel, in Figure 5A and lane 3, CYP1B1 panel, in Figure 5C are duplicated by reusing a same source band with manipulation
- Figure 5B, β -actin panel, representing β -actin expression in different cells with different treatments:
- Lanes 2–4 are identical
- Figure 5D, β -actin panel, representing β -actin expression in different cells with different treatments:
- Lanes 1–4 are duplicated by reusing a same source band with manipulation
- *Cancer Prev Res*. 2015:
- Figure 3A, β -actin panel, representing β -actin expression in DLD-1 treated with different doses of PGE₂:
- Lanes 1, 3, and 5 are identical
 - Lanes 2 and 4 are identical
- Respondent entered into a Voluntary Settlement Agreement (Agreement) and voluntarily agreed to the following:
- (1) Respondent will have his research supervised for a period of seven (7) years beginning on August 14, 2023 (the “Supervision Period”). Prior to the submission of an application for PHS support for a research project on which Respondent’s participation is proposed and prior to Respondent’s participation in any capacity in PHS-supported research, Respondent will submit a plan for supervision of Respondent’s duties to ORI for approval. The supervision plan must be designed to ensure the integrity of Respondent’s research. Respondent will not participate in any PHS-supported research until such a supervision plan is approved by ORI. Respondent will comply with the agreed-upon supervision plan.
- (2) The requirements for Respondent’s supervision plan are as follows:
- i. A committee of 2 senior faculty members at the institution who are familiar with Respondent’s field of research, but not including Respondent’s supervisor or collaborators, will provide oversight and guidance for a period of seven (7) years from the effective date of the Agreement. The committee will review primary data from Respondent’s laboratory on a quarterly basis and submit a report to ORI at six (6) month intervals setting forth the committee meeting dates and Respondent’s compliance with appropriate research standards and confirming the integrity of Respondent’s research.
 - ii. The committee will conduct an advance review of each application for

PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved. The review will include a discussion with Respondent of the primary data represented in those documents and will include a certification to ORI that the data presented in the proposed application, report, manuscript, or abstract are supported by the research record.

(3) During the Supervision Period, Respondent will ensure that any institution employing him submits, in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported and not plagiarized in the application, report, manuscript, or abstract.

(4) If no supervision plan is provided to ORI, Respondent will provide certification to ORI at the conclusion of the Supervision Period that his participation was not proposed on a research project for which an application for PHS support was submitted and that he has not participated in any capacity in PHS-supported research.

(5) During the Supervision Period, Respondent will exclude himself voluntarily from serving in any advisory or consultant capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee.

Dated: September 8, 2023.

Sheila Garrity,

Director, Office of Research Integrity, Office of the Assistant Secretary for Health.

[FR Doc. 2023–19779 Filed 9–12–23; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the

discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Assessment of Potential Substance Abuse Treatment Medications in Nonhuman Primate Models.

Date: October 26, 2023.

Time: 12:00 p.m. to 1:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Soyoun Cho, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 594–9460, Soyoun.cho@nih.gov.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Accelerating the Pace of Drug Abuse Research Using Existing Data.

Date: November 2, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Li Rebekah Feng, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–7245, rebekah.feng@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: September 7, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19724 Filed 9–12–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Eye Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (<https://videocast.nih.gov/watch=52408>).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The intramural programs and projects as well as the grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Eye Council.

Date: October 13, 2023.

Open: 8:30 a.m. to 3:00 p.m.

Agenda: Presentation of the NEI Director's report, discussion of NEI programs, and concept clearances.

Place: National Eye Institute, 6700B Rockledge Drive, Bethesda, MD 20892

Closed: 3:15 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Eye Institute, 6700B Rockledge Drive, Bethesda, MD 20892.

Contact Person: Kathleen C. Anderson, Ph.D., Director, Division of Extramural Activities, National Eye Institute, 6700B Rockledge Drive, Room 3440, Bethesda, MD 20892, (301) 451–2020, kanders1@nei.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the contact person listed above before the meeting or within 15 days after the meeting. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at <https://www.nih.gov/about-nih/visitor-information/campus-access-security> for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: <https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec>, where an agenda and any additional information for the meeting will be posted when available. (Catalogue of Federal Domestic Assistance Program No. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: September 7, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-19758 Filed 9-12-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Interagency Pain Research Coordinating Committee. The meeting will be held as a virtual meeting and will be open to the public as indicated below. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following link: <https://videocast.nih.gov/>.

Name of Committee: Interagency Pain Research Coordinating Committee.

Date: October 16, 2023.

Time: 10:00 a.m. to 5:00 p.m. Eastern Time (ET).

Agenda: The meeting will cover committee business items and Interagency Pain Research Coordinating Committee member updates. Items discussed will include updates on Helping to End Addiction Long-term and Federal Pain Research Strategy research progress.

Webcast Live: <https://videocast.nih.gov/>.

Deadline: Submission of intent to submit written/electronic statement for comments: Monday, October 9, 2023, by 5:00 p.m. ET.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Linda L. Porter, Ph.D., Director, Office of Pain Policy and Planning, Office of the Director, National Institute of Neurological Disorders and Stroke, NIH, 31 Center Drive, Room 8A31, Bethesda, MD 20892, Phone: (301) 451-4460, Email: Linda.Porter@nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Visit the IPRCC website for more information: <http://iprcc.nih.gov>. Agenda and any additional information for the meeting will be posted when available.

Dated: September 7, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-19725 Filed 9-12-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Health Promotion in Communities Study Section.

Date: October 10-11, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Helena Eryam Dagadu, MPH, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3137, Bethesda, MD 20892, (301) 435-1266, dagaduhe@csr.nih.gov.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Therapeutic Approaches to Genetic Diseases Study Section.

Date: October 11-12, 2023.

Time: 8:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Karobi Moitra, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480-6893, karobi.moitra@nih.gov.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Clinical Neuroscience and Neurodegeneration Study Section.

Date: October 11-12, 2023.

Time: 8:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Washington DC/ Georgetown, 2201 M Street NW, Washington, DC 20037.

Contact Person: Jordan M Moore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1002A1, Bethesda, MD 20892, (301) 451-0293, jordan.moore@nih.gov.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Surgery, Anesthesiology and Trauma Study Section.

Date: October 11-12, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Weihua Luo, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5114, MSC 7854, Bethesda, MD 20892, (301) 435-1170, luow@csr.nih.gov.

Name of Committee: Vascular and Hematology Integrated Review Group; Atherosclerosis and Vascular Inflammation Study Section.

Date: October 11-12, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Natalia Komissarova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, (301) 435-1206, komissar@mail.nih.gov.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Basic Mechanisms of Diabetes and Metabolism Study Section.

Date: October 11-12, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Baskaran Thyagarajan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 800B, Bethesda, MD 20892, (301) 594-0331, baski.thyagarajan@nih.gov.
(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 8, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-19757 Filed 9-12-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Shared Instrumentations: NMR/X-ray/Computational Server (S10).

Date: October 5, 2023.

Time: 9:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: SHAN Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, 301-496-4390, shan.wang@nih.gov.

Name of Committee: Cell Biology Integrated Review Group; Development—2 Study Section.

Date: October 10-11, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Rass M Shaiyq, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435-2359, shaiyqr@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cardiovascular Sciences.

Date: October 10, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Imoh S Okon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, 301-347-8881, imoh.okon@nih.gov.

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Child Psychopathology and Developmental Disabilities Study Section.

Date: October 10-11, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852

Contact Person: Karen Elizabeth Seymour, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000-E, Bethesda, MD 20892, (301) 443-9485, karen.seymour@nih.gov.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Bioengineering, Technology and Surgical Sciences Study Section.

Date: October 10-11, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Khalid Masood, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, 301-435-2392, masoodk@csr.nih.gov.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Neurotoxicology and Alcohol Study Section.

Date: October 10-11, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sepandarmaz Aschrafi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040D, Bethesda, MD 20892, (301) 451-4251, Armaz.aschrafi@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 7, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-19756 Filed 9-12-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG-2023-0397]

National Towing Safety Advisory Committee; September 2023 Meetings

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The National Towing Safety Advisory Committee (Committee) will conduct a series of meetings over two days in New Orleans, LA to review and discuss matters relating to shallow-draft inland navigation, coastal waterway navigation, and towing safety. These meetings will be open to the public.

DATES:

Meetings: National Towing Safety Advisory Committee will have subcommittee working sessions on Tuesday, September 26, 2023, from 8 a.m. until 5 p.m. Central Daylight Time. The full Committee will meet on Wednesday, September 27, 2023, from 8 a.m. until 5 p.m. (CDT). Please note these meetings may close early if the Committee has completed its business.

Comments and supporting documentation: To ensure your comments are received by Committee members before the meeting, submit your written comments no later than September 13, 2023.

ADDRESSES: The meeting will be held at the Omni Riverfront Hotel, 701 Convention Center Boulevard, New Orleans, LA 70130.

The National Towing Safety Advisory Committee is committed to ensuring all participants have equal access regardless of disability status. If you require reasonable accommodation due to a disability to fully participate, please email Mr. Matthew D. Layman at Matthew.D.Layman@uscg.mil or call at 202-372-1421 as soon as possible.

Instructions: You are free to submit comments at any time, including orally at the meetings as time permits, but if you want Committee members to review your comment before the meetings, please submit your comments no later than September 13, 2023. We are particularly interested in comments on

the topics in the “Agenda” section below. We encourage you to submit comments through Federal eRulemaking Portal at <https://www.regulations.gov>. If your material cannot be submitted using <https://www.regulations.gov>, email the individual in the **FOR FURTHER**

INFORMATION CONTACT section of this document for alternate instructions. You must include the docket number USCG–2023–0397. Comments received will be posted without alteration at <https://www.regulations.gov> including any personal information provided. You may wish to review the Privacy and Security Notice found via a link on the homepage of <https://www.regulations.gov>, and DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions in response to this document, see DHS’s eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at <https://www.regulations.gov>, and can be viewed by following that website’s instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew D. Layman, Designated Federal Officer of the National Towing Safety Advisory Committee, 2703 Martin Luther King Jr Ave SE, Stop 7509, Washington, DC 20593–7509, telephone 202–372–1421, or Matthew.D.Layman@uscg.mil.

SUPPLEMENTARY INFORMATION: Notice of these meetings is in compliance with *Federal Advisory Committee Act*, (Pub. L. 117–286, 5 U.S.C., ch. 10). The National Towing Safety Advisory Committee is authorized by section 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018*, (Pub. L. 115–282, 132 Stat. 4192), and is codified in 46 U.S.C. 15108. The Committee operates under the provisions of the *Federal Advisory Committee Act* and 46 U.S.C. 15109. The National Towing Safety Advisory Committee provides advice and recommendations to the Secretary of Homeland Security through the Commandant of the U.S. Coast Guard, on matters related to shallow-draft inland navigation, coastal waterway navigation, and towing safety.

Agenda

The agenda for the National Towing Safety Advisory Committee is as follows:

The Committee Meeting Agenda, September 26, 2023

- I. Opening
 - a. Call to order and DFO Remarks.
 - b. NTSAC Chairperson Remarks.
- II. Subcommittee Breakout Working Session
 - a. Subcommittees: Task #21–03, Report On the Anticipated Challenges Expected to Impact the Towing Vessel Industry;
 - b. Task #21–04, Report on the Challenges Faced by the Towing Vessel Industry as a Result of the Covid–19 Pandemic;
 - c. Task #22–01, Recommendations to the Coast Guard for Rulemaking Improvements to Subchapter M;
 - d. Task #22–02, Recommendation for Training and Instruction for Crewmembers Working Aboard Subchapter M Inspected Towing Vessels.
- IV. Full Committee Working Session
 - a. U.S. Coast Guard Administrative Business.
 - b. Review of New Task Statements.
- V. Adjournment of meeting

The Committee Meeting Agenda, September 27, 2023

- I. Opening
 - a. Call to Order and DFO Remarks.
 - b. Committee Chairperson Remarks.
 - c. Roll Call and Determination of Quorum.
 - d. U.S. Coast Guard Leadership Remarks.
- II. Administration
 - a. Adoption of Meeting Agenda.
 - b. Approval of Meeting Minutes for April 12, 2023 Committee Meeting.
- III. Old Business
 - a. Update from Subcommittees:
 - Task #21–03, Report On the Anticipated Challenges Expected to Impact the Towing Vessel Industry;
 - Task #21–04, Report on the Challenges Faced by the Towing Vessel Industry as a Result of the Covid–19 Pandemic;
 - Task #22–01, Recommendation to the Coast Guard for Rulemaking Improvements to Subchapter M;
 - Task #22–02, Recommendation for Training and Instruction for Crewmembers Working Aboard Subchapter M Inspected Towing Vessels.
 - b. Vetting Subcommittee Update.
- IV. New Business
 - a. Committee Planning.
- V. Information Session

- a. U.S. Coast Guard Sector New Orleans.
- b. CG–INV, Sexual Assault and Sexual Harassment (SASH) Reporting.
- c. Towing Vessel National Center of Expertise, 46 CFR Subchapter M Compliance.
- d. District 8 Towing Vessel Coordinator.
- e. Marine Compliance Alliance.
- VI. Committee Discussion
- VII. Public Comment Period
- VIII. Closing Remarks and Plans for Next Meeting
- IX. Adjournment of Meeting

A copy of all pre-meeting documentation, and referenced National Towing Safety Advisory Committee Task Statements, will be available at <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Commercial-Regulations-standards-CG-5PS/Office-of-Operating-and-Environmental-Standards/vfos/TSAC/> no later than September 13, 2023. Alternatively, you may contact Mr. Matthew Layman as noted above in the **FOR FURTHER INFORMATION CONTACT** section above.

There will be a public comment period at the end of the meetings. Speakers are requested to limit their comments to 3 minutes. Please note that the public comment period may end before the period allotted, following the last call for comments. Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT SECTION** to register as a speaker.

Dated: August 28, 2023.

Jeffrey G. Lantz,
Director of Commercial Regulations and Standards.

[FR Doc. 2023–19760 Filed 9–12–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[OMB Control Number 1651–0143]

Agency Information Collection Activities; Revision of an Existing Collection of Information; Advance Travel Authorization (ATA)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request

to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted no later than November 13, 2023 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0143 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological

collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Advance Travel Authorization (ATA).

OMB Number: 1651–0143.

Form Number: N/A.

Current Actions: Revision to an existing collection of information with an increase in total annual burden.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: The Department of Homeland Security (DHS) established new parole processes to allow certain noncitizens and their qualifying immediate family members to request advance authorization to travel to the United States to seek a discretionary grant of parole, issued on a case-by-case basis. To support these processes, U.S. Customs and Border Protection (CBP) developed the Advance Travel Authorization (ATA) capability, which allows individuals to submit information within the CBP One™ application as part of the process. Through an emergency approval, CBP established the ATA collection. Initially, this capability was utilized by Venezuelan citizens and their qualifying immediate family members seeking authorization to travel to the United States under the DHS-established parole process for Venezuelans.¹ DHS later developed similar parole processes for citizens of Cuba,² Haiti,³ and Nicaragua⁴ and their qualifying immediate family members. The four processes are collectively known as CHNV. There is no numerical cap on the number of noncitizens from these four countries who may apply; however, there is a 30,000 limit on the number of travel authorizations DHS may issue each month across all four processes. Additionally, participation is limited in the ATA capability to those individuals who meet certain DHS-established criteria, including but not limited to, possession of a valid, unexpired passport, as well as having an approved U.S.-based financial supporter.

ATA requires the collection of a facial photograph via CBP One™ from those

noncitizens who voluntarily elect to participate in the process to provide accurate identity information for completion of vetting in advance of issuance of a travel authorization.

Advance Travel Authorization (ATA)

The facial biometrics collected from the noncitizens will be linked to biographic information provided by the individual to U.S. Citizenship and Immigration Services (USCIS). This information collection will facilitate the vetting of noncitizens seeking to obtain advance authorization to travel. This collection will also give air carriers that participate in CBP's Document Validation (DocVal) program the ability to validate an approved advance authorization to travel, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

CBP One™ allows the user to capture the required biometrics, currently limited to a live facial photograph, and confirm submission after viewing the captured image. If the user is not satisfied with the image captured, the user can retake the image. If the image capture is unsuccessful, CBP One™ will provide the user with an error message stating that the submission was unsuccessful and permitting the user to try again. If the user continues to experience technical difficulties, the CBP One™ application provides a help desk email to request assistance.

CBP conducts vetting to determine whether the individual poses a security risk to the United States, and to determine whether the individual is eligible to receive advance authorization to travel to the United States to seek a discretionary grant of parole at the port of entry (POE). In the event that an advance authorization to travel may be denied because of a facial photograph match found in criminal databases or if there is a mismatch that limits the ability to confirm identity, then the match or mismatch will be verified by a CBP officer before the advance travel authorization is officially denied. Currently, ATA collects certain limited biographic and biometric information, and biometric collection is limited to the collection of a live facial photograph.

If the advance travel authorization is denied, the individual will not be authorized to travel to the United States to seek parole under this process. In the event that the user is not authorized to travel under this process, the user may still seek entry to the United States through another process, including by filing a request for consideration of parole with USCIS or applying with the

¹ 87 FR 63507 (Oct. 19, 2023); *see also* 88 FR 1279 (Jan. 9, 2023).

² 88 FR 1266 (Jan. 9, 2023); *see also* 88 FR 26329 (Apr. 28, 2023).

³ 88 FR 1243 (Jan. 9, 2023); *see also* 26 FR 327 (Apr. 28, 2023).

⁴ 88 FR 1255 (Jan. 9, 2023).

Department of State (DOS) to obtain a visa. If travel authorization is approved, the approval establishes that the individual has obtained advance authorization to travel to the United States to seek a discretionary grant of parole, consistent with 8 CFR 212.5(f), but does not guarantee boarding or a specific processing disposition at a POE. Upon arrival at a U.S. POE, the traveler will be subject to inspection by a CBP officer, who will make a case-by-case processing disposition determination.

This collection of information is authorized by 8 U.S.C. 1103 and 1182(d)(5), and 8 CFR 212.5(f). DHS has also publicly announced the policy and accompanying collection on its website and has also published a **Federal Register** notice for each of the named countries.

CBP One™ collects the following information from the individual submitting a request for an advance authorization to travel to the United States to seek parole under this process:

1. Facial Photograph
2. Photo obtained from the passport or Chip on ePassport, where available
3. Alien Registration Number
4. First and Last Name
5. Date of Birth
6. Passport Number

Additionally, CBP further revised this collection through another emergency submission to allow individuals seeking to travel to the United States as part of the Family Reunification Parole (FRP) processes for certain nationals of Cuba,⁵ Haiti,⁶ Colombia,⁷ Guatemala,⁸ Honduras,⁹ and El Salvador¹⁰ to use the existing ATA capability to submit information to CBP. The FRP processes begin with an invitation being sent to a petitioner who previously received an approved Form I-130, *Petition for Alien Relative*, on behalf of the potential principal beneficiary, and if applicable, the beneficiary's accompanying derivative beneficiaries. The petitioner then submits a Form I-134A, *Online Request to be a Supporter and Declaration of Financial Support*, on behalf of the potential principal beneficiary, and if applicable, the beneficiary's accompanying derivative beneficiaries. For those petitioners whose Form I-134A is confirmed by USCIS, the beneficiaries will receive an email with instructions to create an online account with myUSCIS. There, the potential beneficiary will confirm

their biographic information and complete attestations, and then receive instructions to download the CBP One™ mobile application to continue through the process. USCIS will send the biographic information to CBP. Additionally, once the beneficiary completes their CBP One™ submission, utilizing the ATA capability, CBP will conduct vetting, and if appropriate, issue an advance authorization to travel. The information collected as part of these new processes is the same as that which is already collected from other populations through ATA. This information collection will facilitate the vetting of noncitizens seeking to obtain advance authorization to travel and will give air carriers that participate in CBP's DocVal program the ability to validate an approved travel authorization, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

New Changes

1. *Adding Uniting for Ukraine (U4U) respondent group to collection:* In response to the President's commitment to welcome 100,000 Ukrainian citizens and others fleeing Russia's aggression, DHS, in coordination with DOS, established the Uniting for Ukraine¹¹ (U4U) parole process on April 25, 2022. This process allows Ukrainian citizens and their qualifying family members the ability to submit certain personal information to USCIS and CBP to facilitate the issuance of an advance authorization to travel to the United States to seek parole. At the time U4U was implemented, full ATA capability was not yet developed and CBP uses different processes to screen and vet Ukrainians seeking parole. Currently, individuals seeking to travel under U4U do not utilize CBP One™ or the ATA capability during their process. To align U4U with the other DHS parole processes, including CHNV and FRP, the ATA capability will be implemented for those individuals requesting authorization to fly directly to the United States to seek a discretionary grant of parole. The ATA capability will be added as part of a step in the U4U process to facilitate the vetting of noncitizens seeking to obtain advance authorization to travel and will give air carriers that participate in CBP's DocVal program the ability to validate an approved travel authorization, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

2. *Adjusted Burden:* Furthermore, coinciding with USCIS, CBP has added to the burden estimate for this collection, to account for any potential expansion(s) that align with new or revised policies or processing capacity over the next three years.

3. *New Data Element:* This revision also adds a new data element to this collection; the physical location (longitude/latitude) at the time of any biometric information submission. This data element will further secure the submission process and provide accurate identity information for completion of vetting in advance of issuance of a travel authorization.

CBP invites comments from the public on all changes established by previously approved emergency submissions and the new proposed revisions listed in this FRN.

Type of Information Collection: Advance Travel Authorization (ATA).

Estimated Number of Respondents: 562,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 562,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 93,667.

Dated: September 7, 2023.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2023-19720 Filed 9-12-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-6419-N-01]

Announcement of the Housing Counseling Federal Advisory Committee; Notice of Public Meeting

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

ACTION: Notice of Housing Counseling Federal Advisory Committee public meeting.

SUMMARY: This gives notice of a Housing Counseling Federal Advisory Committee (HCFAC) meeting and sets forth the proposed agenda. The HCFAC meeting will be held on Thursday September 28, 2023. The meeting is open to the public and is accessible to individuals with disabilities.

DATES: The virtual meeting will be held on Thursday September 28, 2023,

⁵ 88 FR 54639 (Aug. 11, 2023).

⁶ 88 FR 54635 (Aug. 11, 2023).

⁷ 88 FR 43591 (July 10, 2023).

⁸ 88 FR 43581 (July 10, 2023).

⁹ 88 FR 43601 (July 10, 2023).

¹⁰ 88 FR 43611 (July 10, 2023).

¹¹ See Implementation of the Uniting for Ukraine Parole Process, 87 FR 25040 (Apr. 25, 2022).

starting at 1:00 p.m. Eastern Daylight Time (EDT), via ZOOM.

FOR FURTHER INFORMATION CONTACT:

Virginia F. Holman, Housing Program Technical Specialist, Office of Housing Counseling, U.S. Department of Housing and Urban Development, 600 East Broad Street, Richmond, VA 23219; telephone number 540-894-7790 (this is not a toll-free number); email virginia.f.holman@hud.gov. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit: <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Individuals may also email HCFACCommittee@hud.gov.

SUPPLEMENTARY INFORMATION: HUD is convening the virtual meeting of the HCFAC on Thursday September 28, 2023, from 1:00 p.m. to 4:00 p.m. EDT. The meeting will be held via ZOOM. This meeting notice is provided in accordance with the Federal Advisory Committee Act, 5. U.S.C. app. 10(a)(2).

Draft Agenda—Housing Counseling Federal Advisory Committee Meeting

Thursday September 28, 2023

- I. Welcome
- II. Presentations and Advisory Committee Discussion
- III. Public Comment
- IV. Next Steps
- V. Adjourn

Registration

The public is invited to attend this half-day (3 hours) virtual meeting, using ZOOM Advance registration is required to attend. To register, please visit https://us06web.zoom.us/webinar/register/WN_5Njs6kt0R2mlFRlulTTcZw to complete your registration no later than September 21, 2023. Registration will be closed for the event on September 21, 2023. If you have any questions about registration, please email HCFACCommittee@ajantaconsulting.com. After submitting the registration form above, you will receive registration confirmation with the meeting link and passcode needed to attend. Individuals with speech or hearing impairments may learn more about how to make an accessible telephone call by visiting: <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Closed captioning will be available during the ZOOM meeting.

Comments

Members of the public will have an opportunity to provide oral and written

comments relative to agenda topics for the HCFAC's consideration. Your registration confirmation will also explain the process for speaking.

Available time for public comments will be limited to ensure pertinent HCFAC business is completed. The amount of time allotted to each person will be limited to two minutes and will be allocated on a first-come first-served basis by HUD. Written comments can be provided on the registration form no later than September 21, 2023. Please note, written comments submitted will not be read during the meeting. The HCFAC will not respond to individual written or oral statements during the meeting; but it will take all public comments into account in its deliberations.

Meeting Records

Records and documents discussed during the meeting as well as other information about the work of the HCFAC, will be available for public viewing as they become available on [hud.gov](https://www.hud.gov/program/offices/housing/sfh/hcc) at: <https://www.hud.gov/program/offices/housing/sfh/hcc>; and at <https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzvQAAQ>.

Information on the Committee is also available on HUD Exchange at <https://www.hudexchange.info/programs/housing-counseling/federal-advisory-committee/>.

Julia R. Gordon,

Assistant Secretary for Housing, FHA Commissioner.

[FR Doc. 2023-19772 Filed 9-12-23; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7077-N-13A]

Privacy Act of 1974; System of Records

AGENCY: Office of Multifamily Housing, Office of Housing, HUD.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Housing and Urban Development (HUD), Office of Multifamily Housing, is modifying system of records for the Tenant Rental Assistance Certification System (TRACS). The modification will clarify the authority for maintenance of the system; routine uses of records in the system; practices for retrieval, policies and practices for retention and disposal

of records, system location, system manager(s), and administrative updates to comply with the OMB Circular A-108 SORN template format.

DATES: Comments will be accepted on or before October 13, 2023. This proposed action will be effective immediately upon publication. Routine uses will become effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number or by one of the following methods:

Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions provided on that site to submit comments electronically.

Fax: 202-619-8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; Office of the Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410-0001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Ladonne White; 451 Seventh Street SW, Room 10139; Washington, DC 20410-0001; telephone number (202) 708-3054 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relayservice-trs>.

SUPPLEMENTARY INFORMATION: This "Notice of a Modified System of Records" aligns the cited statutory authority with the broad purpose of the system, which has been and continues to be the collection of information for managing the Office of Multifamily Housing (MFH) Programs' rental assistance programs. With this change, the cited authority now includes express citations for: the Tenant Rental Assistance Certification System (TRACS) is being enhanced to comply with Presidential Executive Order 13985, released on January 20, 2021, "Executive Order on Advancing Racial Equity and Support for Underserved

Communities Through the Federal Government,” that requires system modifications to collect ethnic and race data to evaluate whether HUD’s policies produce racially inequitable results when implemented and to ensure underserved communities are properly supported; HUD to share data match capability to enable the ability to establish eligibility for the Lifeline, EBB and other FTB programs for families which also participate in a HUD rental assistance program. HUD must develop an application protocol interface (API) with the Universal Service Administrative Company (USAC), designated by the Federal Communications Commission (FCC) as the Federal administrator of the Universal Service Fund (USF or Fund) Lifeline Program (Lifeline), the Emergency Broadband Benefit (EBB) program and other Federal Telecommunications Benefit (FTB) programs. The USAC Routine Use #8 will enable FCC to use Lifeline eligibility criteria as specified by the Lifeline program establishing a matching program between HUD’s TRACS and USAC’s National Verifier. 47 CFR 54.409; and lastly the Housing Opportunity Through Modernization Act of 2016 (HOTMA) was enacted on July 29, 2016. The HOTMA Final Rule will revise HUD regulations to put sections of HOTMA into effect. These sections make sweeping changes to the United States Housing Act of 1937, particularly those affecting TRACS income calculation and reviews for assisted families, occupancy standards, and the financial records required for eligibility determinations. This includes: (a) Changes about income reviews for public housing and HUD’s Section 8 programs. (b) Modifications to the continued occupancy standards of public housing residents whose income has grown above the threshold for initial eligibility, including setting maximum limits on the assets that families living in public housing and Section 8 assisted housing may have. (c) HUD must direct public housing agencies to require that all applicants for and recipients of assistance, through HUD’s public housing or Section 8 programs, let public housing agencies obtain financial records needed for eligibility determinations.

SYSTEM NAME AND NUMBER:

Tenant Rental Assistance Certification System (TRACS)—HUD/HOU-11.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The Department of Housing and Urban Development Headquarters, 451 Seventh Street SW, Washington, DC 20410-0001; and at HUD Field and Regional Office. TRACS is maintained at: the National Center for Critical Information Processing and Storage, 9325 Cypress Loop Road, Stennis, MS 39629.

SYSTEM MANAGER(S):

Lanier M. Hylton, Senior Program Manager, Office of Deputy Assistant Secretary for Multifamily Housing Programs, 451 7th Street SW, Room 6124 Washington, DC 20410, (202) 708-2495.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The United States Housing Act of 1937, Public Law 93-383, 88 Stat. 653, as amended, 42 U.S.C. 1437 *et seq.*; The Housing and Community Development Act of 1987, Public Law 100-242, 101 Stat. 1864, section 165, 42 U.S.C. 3543, Public Law 97-35, 95 Stat. 408; The Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Public Law 100-628, 102 Stat. 3259, section 904 as amended, 42 U.S.C. 3544.

PURPOSE(S) OF THE SYSTEM:

TRACS performs edit checks and accepts tenant and voucher request data needed to verify data quality, and interfaces with other HUD systems to validate tenant income, verify contract funding, obligate, and commit contract funds, provide information to other HUD divisions, and submit voucher requests for payment to minimize improper payments, and detect subsidy fraud, waste, and abuse in multifamily housing rental housing assistance programs. TRACS automates and integrates critical modules for TRACS activities related to the Contract Business System, the Tenant Business System, and the Voucher/Payment Business System:

- Integrated Multifamily Access Exchange (iMAX) provides efficient access to authorized industry partners (*i.e.*, Contract Administrators (CAs) and Owner/Agents (OAs)) to transmit tenant data and voucher data files to HUD and other authorized partners.
- Integrated Contracts (iCon) supports rental assistance contracts repository. Contracts are added (*e.g.*, for the Rental Assistance Demonstration (RAD) and Paperwork Reduction Act (PRA) 811 demo programs) and maintained by internal MFH staff.
- Automated Renewal and Amendment Management Subsystem (ARAMS) Supports funding functions for contract renewals and amendments.

Headquarters staff enter and update funding transactions which are then interfaced to Line of Credit Control System (LOCCS).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals receiving project-based rental housing assistance; property owner, management agent, and contract administrator who administers or receives subsidies.

CATEGORIES OF RECORDS IN THE SYSTEM:

Full Name, SSN, Date of Birth, Employment Status/History/Information, Address, Marital Status, Military Status or other information, Race/Ethnicity, Phone Number(s), Email Address(s), Salary, Sex, Taxpayer ID, User ID, Name of head of household member, Name of all household members, Name of Owners/management agent, Tenant/owners/management agent, Identification number: Alien Registration Number and Taxpayer Identification Number (TIN), Spouse name, and financial transactions pertaining to the contracts.

RECORD SOURCE CATEGORIES:

Records in the system are obtained from owners/management agents/ Housing Authorities and/or Contract administrators on behalf of the assisted tenants. The TRACS system and contained subsystems may collect data and information from the following other systems: Geocode Service Center (GSC), Line of Credit Control System (LOCCS), HUD Central Accounting and Program System (HUDCAPS), Integrated Real Estate Management System (iREMS), Enterprise Income Verification (EIV), Multifamily Data Warehouse (MFH) Data Mart, and Web Access Security System (WASS).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

(1) To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities, including, but not limited to, State and local governments and other research institutions or their parties, and entities and their agents with whom HUD has a contract, service agreement, grant, cooperative agreement, or other agreement for the purposes of statistical analysis and research in support of program operations, management, performance monitoring, evaluation, risk management, and policy development, to otherwise support the Department’s mission, or for other research and statistical purposes not otherwise prohibited by law or regulation. Records under this routine use may not be used

in whole or in part to make decisions that affect the rights, benefits, or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form.

(2) To Housing Authorities, (HAs) to verify the accuracy and completeness of tenant data used in determining eligibility and continued eligibility and the amount of housing assistance received.

(3) To Private Owners of assisted housing to verify the accuracy and completeness of applicant and tenant data used in determining eligibility and continued eligibility and the amount of assistance received.

(4) To HAs, owners, management agents and contract administrators to identify and resolve discrepancies in tenant data.

(5) To the Internal Revenue Service to report income using IRS Form 1099 and to disclose records to the Internal Revenue Service when HUD determines that the use of those records is relevant and necessary to report payments or discharge of indebtedness.

(6) To Social Security Administration and Immigration and Naturalization Service to verify alien status and continued eligibility in HUD's rental assistance programs via Enterprise Income Verification (EIV).

(7) To the congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

(8) To the Universal Service Administrative Company (USAC), which is designated by the Federal Communications Commission (FCC) as the Federal administrator of the Universal Service Fund (USF or Fund) Lifeline Program (Lifeline), the Emergency Broadband Benefit (EBB) program and other Federal Telecommunications Benefit (FTB) programs that utilizes Lifeline eligibility criteria as specified by the Lifeline program, 47 CFR 54.409. The purpose of this routine use is to establish eligibility for the Lifeline, EBB and other FTB programs for families which also participate in a HUD rental assistance program.

(9) To any Federal, State, or local agency (e.g., state agencies administering the state's unemployment compensation laws, Temporary Assistance to Needy Families, or Supplemental Nutrition Assistance Program agencies, U.S. Department of Health and Human Services, and U.S. Social Security Administration): To verify the accuracy and completeness of the data provided, to verify eligibility or continued eligibility in HUD's rental

assistance programs, to identify and recover improper payments under the Payment Integrity Information Act of 2019, Public Law 116–117., and to aid in the identification of tenant errors, fraud, and abuse in assisted housing programs.

(10) To appropriate agencies, entities, and persons when: (1) HUD suspects or has confirmed that there has been a breach of the system of records; (2) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HUD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(11) To another Federal agency or Federal entity, when HUD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to suspected or confirmed breach, or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(12) To contractors, experts, and consultants with whom HUD has a contract, service agreement, or another assignment when HUD provides system access to HUD contractors to develop, maintain and troubleshoot application issues to support the Department's programs needed to meet its mission. Upgrades and migrations to this TRACS system are needed to meet the changes in technology and improve system performance. This is a corollary purpose that is appropriate and necessary for the efficient conduct of government and in the best interest of both the individual and the public.

(13) To Federal agencies, non-Federal entities, their employees, and agents (including contractors, their agents or employees; employees or contractors of the agents or designated agents); or contractors, their employees or agents with whom HUD has a contract, service agreement, grant, cooperative agreement, or computer matching agreement for the purpose of: (1) detection, prevention, and recovery of improper payments; (2) detection and prevention of fraud, waste, and abuse in major Federal programs administered by a Federal agency or non-Federal entity;

(3) detection of fraud, waste, and abuse by individuals in their operations and programs; (4) for the purpose of establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefits programs or recouping payments or delinquent debts under such Federal benefits programs. Records under this routine use may be disclosed only to the extent that the information shared is necessary and relevant to verify pre-award and prepayment requirements prior to the release of Federal funds or to prevent and recover improper payments for services rendered under programs of HUD or of those Federal agencies and non-Federal entities to which HUD provides information under this routine use.

(14) To Appropriate Federal, State, and local governments, or persons when HUD discloses relevant information to protect the health or safety of individuals or data subjects. This is a corollary purpose that is appropriate and necessary for the efficient conduct of government and in the best interest of both the individual and the public. HUD OGC and Privacy Branch provide determination/authorization for any Health and Breach incidents disclosure prior to a HUD disclosure.

(15) To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service, grant, cooperative agreement, or other agreement with HUD, when necessary to accomplish an agency function related to a system of records.

(16) To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

(17) To appropriate Federal, State, local, Tribal, or other governmental agencies or multilateral governmental

organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws and when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law.

(18) To a court, magistrate, administrative tribunal, or arbitrator in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, mediation, or settlement negotiations, or in connection with criminal law proceedings; when HUD determines that use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where HUD has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Name, SSN, Home Address.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

TRACS retention and disposal requirements are assessed at the module level:

(a) ARAMS module (Contract Database) retention instruction is Temporary: Delete data twenty-five years after the contract expiration date. Tenant Module retention (Extract of TRACS Tenant Data (HUD 50059 data)) instruction is Permanent: Voucher Module (Voucher Database) retention instruction is Temporary: Archive data to tape five (5) years after the last voucher date or any voucher from a contract that has been terminated five (5) years or longer. Delete data from the tape twenty-five (25) years after the last voucher date or any voucher from a contract that has been terminated twenty-five (25) years or longer. N1–207–06–2–Item 14 B a2(c).

(b) iMAX Module retention is Temporary: Destroy upon verification of successful creation of the final document or file or when no longer

needed for business use, whichever is later. DAA–GRS–2017–0003–0002, which provides the legal authority to delete this information as required by law.

(c) TRACS User Guides and Manuals retention instruction is Temporary: Destroy or delete when superseded or obsolete. N1–207–06–2, item 14.D(e)

(d) iCon module (Contract Database) retention is Temporary: Delete data twenty-five years after the contract expiration date. Backup and Recovery of digital media will be destroyed or otherwise rendered irrecoverable per NIST SP 800–88 Revision 1 “Guidelines for Media Sanitization” N1–207–06–2–Item 14 B a2(b).

(e) Tenant Database (HUD 50059 data) TEMPORARY. Archive data to tape three (3) years after the certification effective date. NARA Job No. N1–207–06–2, item 14.B (a).

(f) Tenant Archives Database. Sub-set of data derived from Tenant Database. TEMPORARY. Delete data twenty-five (25) years after the tenant move-out date or twenty-five (25) years after the termination date. NARA Job No. 1–207–06–2, item 14.B(a)(1).

(g) System Documentation Data Administration Records GRS 3.1 Item 50 & 51.

a. Item 50–Documentation necessary for preservation of permanent electronic records. Permanent. Transfer to the National Archives with the permanent electronic records to which the documentation relates. DAA–GRS–2013–0005–0002.

b. Item 51–All documentation for temporary electronic records and documentation not necessary for the preservation of permanent records Temporarily. Destroy 5 years after the project/activity/transaction is completed or superseded, or the associated system is terminated, or the associated data is migrated to a successor system, but longer retention is authorized if required for business use. DAA–GRS–2013–0005–0034.

(h) System Development records. GRS 3.1 Item 10 & 11.

a. Item 10–Infrastructure project records. Temporary. Destroy 5 years after the project is terminated, but longer retention is authorized if required for business use.

b. Item 11–System development records. Temporary. Destroy 5 years after the system is superseded by a new iteration, or is terminated, defunded, or no longer needed for agency/IT administrative purposes, but longer retention is authorized if required for business use. DAA–GRS2013–0005–00075.

(i) Systems and data security records GRS 3.2 Item 10.

a. Item 10–Systems and data security records. Temporary. Destroy 1 year after the system is superseded by a new iteration or when no longer needed for agency/IT administrative purposes to ensure a continuity of security controls throughout the life of the system. DAA–GRS2013–0006–0001.

(j) System Access Records GRS 3.2 Item 30 & 31.

a. Item 30–Systems not requiring special accountability for access. Temporary. Destroy when business use ceases. DAA–GRS2013–0006–0003.

b. Item 31–Systems requiring special accountability for access. Temporary. Destroy 6 years after the password is altered or the user account is terminated, but longer retention is authorized if required for business use. DAA–GRS–2013–0006–00047.

(k) Input and Output Files GRS 5.2 Item 20.

a. Item 20–Intermediary records. Temporary. Destroy upon verification of successful creation of the final document or file or when no longer needed for business use, whichever is later. DAA–GRS–2017–0003–0002.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to TRACS is by password and user ID and is limited to authorized users. Role-based access levels or assignment roles are restricted to those with a need to know. When first gaining access to TRACS annually, all users must agree to the system’s Rules of Behavior, which specify the handling of personal information and any physical records. Authorized users can download reports—the SSN is masked in both the system and reports during the download process. Access to facilities containing and storing physical copies of this data is controlled by security protocols designed to limit access to authorized individuals.

RECORD ACCESS PROCEDURES:

Individuals requesting records of themselves should address written inquiries to the Department of Housing Urban and Development 451 7th Street SW, Washington, DC 20410–0001. For verification, individuals should provide their full name, current address, and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4.

CONTESTING RECORD PROCEDURES:

The HUD rule for contesting the content of any record pertaining to the individual by the individual concerned

is published in 24 CFR 16.8 or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals requesting notification of records of themselves should address written inquiries to the Department of Housing Urban Development, 451 7th Street SW, Washington, DC 20410-0001. For verification purposes, individuals should provide their full name, office or organization where assigned, if applicable, and current address and telephone number. In addition, the requester must provide either a notarized statement or an unsworn declaration made under 24 CFR 16.4.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None

HISTORY:

Docket No. FR-5921-N-13, 81 FR 56684, August 22, 2016.

LaDonne L. White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2023-19782 Filed 9-12-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7070-N-53]

30-Day Notice of Proposed Information Collection: Housing Counseling Federal Advisory Committee (HCFAC); Forms: HUD-90005 Application for Membership on the Housing Counseling Federal Advisory Committee and OGE-450 Confidential Financial Disclosure Report; OMB Control No.: 2502-0606

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* October 13, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/

PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410-5000; email PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT:

Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 7th Street SW, Room 8210, Washington, DC 20410; email; Colette.Pollard@hud.gov or telephone 202-402-3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on December 22, 2022 at 87 FR 78704.

A. Overview of Information Collection

Title of Information Collection: Housing Counseling Federal Advisory Committee (HCFAC).

OMB Approval Number: 2502-0606.

OMB Expiration Date: 9/30/2023.

Type of Request: Revision of a currently approved collection.

Form Number: HUD-90005; OGE-450.

Description of the need for the information and proposed use: The Expand and Preserve Homeownership through Counseling Act (Pub. L. 111-203, section 1441, July 21, 2010) (Act), added 42 U.S.C. 3533(g)(4) to direct the Office of Housing Counseling to form a Housing Counseling Federal Advisory Committee (HCFAC) with members equally representing the mortgage and real estate industries, including housing consumers and housing counseling agencies certified by the Secretary. The HUD-90005 Application for Membership on the Housing Counseling

Federal Advisory Committee will collect information for individuals in those groups who want to serve on the HCFAC. The information will be used by HUD's Office of Housing Counseling to review and recommend to the Secretary for appointment the members of the Housing Counseling Federal Advisory Committee to ensure the members meet the requirements of the Expand and Preserve Homeownership through Counseling Act and of the Federal Advisory Committee Act.

Additionally, HCFAC members must adhere to the conflict-of-interest rules applicable to Special Government Employees as such employees are defined in 18 U.S.C. 202(a). The rules include relevant provisions in 18 U.S.C. related to criminal activity, Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635) and Executive Order 12674 (as modified by Executive Order 12731). Therefore, applicants will be required to submit to pre-appointment screenings relating to identity of interest and financial interests that HUD might require. If selected, HCFAC members will also be asked to complete OGE-450 Confidential Financial Disclosure Report (OGE-450).

Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Estimated Number of Respondents: 162.

Estimated Number of Responses: 162.

Frequency of Response: Once.

Average Hours per Response: 1.61.

Total Estimated Burden: 261 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use

of automated collection techniques or other forms of information technology. HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–19774 Filed 9–12–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N–54]

30-Day Notice of Proposed Information Collection: 24 CFR Part 58, Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities; OMB Control No.: 2506–0087

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* October 13, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000; email PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT:

Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 7th Street SW, Room 8210, Washington, DC 20410; email; Colette.Pollard@hud.gov or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on July 7, 2023, at 88 FR 43370.

A. Overview of Information Collection

Title of Information Collection: 24 CFR part 58—Environmental Review Procedures for Entities Assuming HUD Environmental Review Responsibilities.

OMB Approval Number: 2506–0087.

Type of Request: Revision of currently approved collection.

Form Numbers: HUD–7015.15; TDAT Interim Data Updates Request Form.

Description of the need for the information and proposed use: The RROF/C is used to document compliance with the National Environmental Policy Act (NEPA) and the related environmental statutes, executive orders, and authorities in accordance with the procedures identified in 24 CFR part 58. Recipients certify compliance and make request for release of funds.

Respondents: State, local, and tribal governments and nonprofit organizations.

Estimated Number of Respondents: 19,555.

Estimated Number of Responses: 19,555.

Frequency of Response: 1.

Average Hours per Response: .6.

Total Estimated Burdens: 11,733 hours.

Description of the need for the information and proposed use: The Tribal Directory Assessment Tool (TDAT) Interim Data Updates Request Form allows tribal historic preservation staff from federally recognized tribes to update their tribe’s information within

TDAT to ensure the most up-to-date contact information and tribal interests are listed. TDAT is an online database that enables HUD users to access contact information for Tribal Leaders and Tribal Historic Preservation Officers for federally recognized Tribes for the purposes of conducting Section 106 tribal consultation under the National Historic Preservation Act.

Respondents: State, local, and tribal governments and nonprofit organizations.

Estimated Number of Respondents: 233.

Estimated Number of Responses: 233.

Frequency of Response: 1.

Average Hours per Response: .25.

Total Estimated Burdens: 58.25 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency’s estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–19781 Filed 9–12–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[L19900000.PO0000.LLWO320.23X; OMB Control Number 1004–0169]

Agency Information Collection Activities; Use and Occupancy Under the Mining Laws

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before November 13, 2023.

ADDRESSES: Send your written comments on this information collection request (ICR) by mail to Darrin King, Information Collection Clearance Officer, U.S. Department of the Interior, Bureau of Land Management, Attention PRA Office, 440 W 200 S #500, Salt Lake City, UT 84101; or by email to BLM_HQ_PRA_Comments@blm.gov. Please reference Office of Management and Budget (OMB) Control Number 1004–0169 in the subject line of your comments. Please note that the electronic submission of comments is recommended.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Kirk Rentmeister by email at krentmeis@blm.gov, or by telephone at 775–453–5514. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent

burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: This information collection enables the BLM to regulate the use and occupancy of unpatented hardrock mining claims, and to take any action necessary to prevent unnecessary or undue degradation of public lands as a result of such use or occupancy. The BLM collects information from mining claimants who want to undertake the activities that are necessary in order to locate a mining claim or mill site. This OMB Control Number is currently scheduled to expire on June 30, 2024. This request is for OMB to extend this OMB control number for an additional three (3) years.

Title of Collection: Use and Occupancy Under the Mining Laws (43 CFR Subpart 3715).

OMB Control Number: 1004–0169.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Mining claimants.

Total Estimated Number of Annual Respondents: 70.

Total Estimated Number of Annual Responses: 70.

Estimated Completion Time per Response: 4 hours.

Total Estimated Number of Annual Burden Hours: 280.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin A. King,

Information Collection Clearance Officer.

[FR Doc. 2023–19778 Filed 9–12–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1123–0NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Petition for Commutation of Sentence

AGENCY: Office of the Pardon Attorney, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Office of the Pardon Attorney, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on June 27, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until October 13, 2023.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated

response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Kira Gillespie, Deputy Pardon Attorney, Office of the Pardon Attorney, 950 Pennsylvania Avenue NW, Main Justice—RFK Building, Washington, DC 20530; kira.gillespie@usdoj.gov; (202) 616-6073.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and/or
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function and entering either the title of the information collection. This information collection request may be viewed at www.reginfo.gov. Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* New collection.
2. *Title of the Form/Collection:* Petition for Commutation of Sentence.
3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* There is no agency form number for this collection. The applicable component within the Department of Justice is the Office of the Pardon Attorney.
4. *Affected public who will be asked or required to respond, as well as a brief abstract:*
Affected Public: Individuals or households.
Abstract: Applicants seeking commutation of sentence by the President will be asked to respond to this collection. The principal purpose for collecting this information is to enable the Office of the Pardon Attorney to process applicants' requests for commutation. The information is necessary to verify applicants' identities, conduct investigation of the applicants' backgrounds and criminal records, and ensure proper notification to the Bureau of Prisons, Federal Bureau of Investigation, U.S. Attorneys' Offices, U.S. Probation Offices, and federal courts in the event of grants of executive clemency.

5. *Obligation to Respond:* Voluntary.
6. *Total Estimated Number of Respondents:* 5,000.
7. *Estimated Time per Respondent:* 3 hours.
8. *Frequency:* Once/annually.
9. *Total Estimated Annual Time Burden:* 15,000 hours.
10. *Total Estimated Annual Other Costs Burden:* \$0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC 20530.

Dated: September 8, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023-19804 Filed 9-12-23; 8:45 am]

BILLING CODE 4410-29-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Description of Coal Mine Work and Other Employment

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before October 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michelle Neary by telephone at 202-693-6312, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The Description of Coal Mine Work and Other Employment (Form CM-913) is used to compare non-coal mine work to coal mine work. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 9, 2023 (88 FR 29952).

This information collection is subject to the PRA. A Federal agency generally

cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OWCP.

Title of Collection: Description of Coal Mine Work and Other Employment.

OMB Control Number: 1240–0035.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 4,710.

Total Estimated Number of Responses: 4,710.

Total Estimated Annual Time Burden: 2,355 hours.

Total Estimated Annual Other Costs Burden: \$2,600.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,
Senior PRA Analyst.

[FR Doc. 2023–19714 Filed 9–12–23; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2013–0012]

Modification to the List of Appropriate NRTL Program Test Standards and the Scope of Recognition of Several NRTLs

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to delete test standards from the Nationally Recognized Testing Laboratories (NRTL) Program's list of appropriate test standards and modify the scope of recognition of several NRTLs.

DATES: The actions contained in this notice will become effective on September 13, 2023.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: meilinger.francis2@dol.gov.

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, telephone: (202) 693–2110 or email: robinson.kevin@dol.gov. OSHA's web page includes information about the NRTL Program (see <http://www.osha.gov/dts/otpc/nrtl/index.html>).

SUPPLEMENTARY INFORMATION:

I. Background

The NRTL Program recognizes organizations that provide product-safety testing and certification services to manufacturers. These organizations perform testing and certification for purposes of the program, to U.S. consensus-based product-safety test standards. The products covered by the NRTL Program consist of those items for which OSHA safety standards require “certification” by a NRTL. The requirements affect electrical products and 36 other types of products. OSHA does not develop or issue these test standards, but generally relies on standards development organizations (SDOs), which develop and maintain the standards using a method that provides for input and consideration of views of industry groups, experts, users, consumers, governmental authorities, and others having broad experience in the safety field involved.

A. Deletion and Replacement of Test Standards

The NRTL Program regulations require that appropriate test standards be maintained and current (29 CFR 1910.7(c)). A test standard withdrawn by an SDO is no longer considered an appropriate test standard (CPL 01–00–004, NRTL Program Policies, Procedures and Guidelines Directive (NRTL Program Directive), Ch. 2.IX.C.1). It is OSHA's policy to remove recognition of withdrawn test standards by issuing a correction notice in the **Federal Register** for all NRTLs recognized for the withdrawn test standards (Id.). However, SDOs frequently will designate a replacement standard for withdrawn standards. OSHA will recognize a NRTL for an appropriate

replacement test standard if the NRTL has the requisite testing and evaluation capability for the replacement test standard (NRTL Program Directive, Ch. 2.IX.C.2).

One method that NRTLs may use to show such capability involves an analysis to determine whether any testing and evaluation requirements of existing test standards in a NRTL's scope are comparable (i.e., are completely or substantially identical) to the requirements in the replacement test standard (NRTL Program Directive, Ch. 2.IX.C.3). If OSHA's analysis shows the replacement test standard does not require additional or different technical capability than an existing test standard(s), and the replacement test standard is comparable to the existing test standard(s), then OSHA can add the replacement test standard to affected NRTLs' scope of recognition. If OSHA's analysis shows the replacement test standard requires an additional or different technical capability, or the replacement test standard is not comparable to any existing test standards, each affected NRTL seeking to have OSHA add the replacement test standard to the NRTL's scope of recognition must provide information to OSHA that demonstrates technical capability (NRTL Program Directive, Ch. 2.IX.D).

B. Other Reasons for Removal of Test Standards From the NRTL List of Appropriate Test Standards

OSHA may choose to remove a test standard from the NRTL list of appropriate test standards based on an internal review in which NRTL Program staff review the NRTL list of appropriate test standards to determine if the test standards conform to the definition of an appropriate test standard defined in NRTL Program regulations and policy. There are several reasons for removing a test standard based on this review. First, a document that provides the methodology for a single test is a test method rather than an appropriate test standard (29 CFR 1910.7(c)). A test standard must specify the safety requirements for a specific type of product(s) (NRTL Program Directive, Ch. 2.VIII.C.1). A test method, however, is a specified technical procedure for performing a test. As such, a test method is not an appropriate test standard. While a NRTL may use a test method to determine if certain safety requirements are met, a test method is not itself a safety requirement for a specific product category.

Second, a document that focuses primarily on usage, installation, or maintenance requirements, and not

safety requirements (*i.e.*, features, parts, capabilities, usage limitations, or installation requirements that would create a potential hazard in operating the equipment if not properly used), would also not be considered an appropriate test standard (NRTL Program Directive, Ch. 2.VIII.C.1). In some cases, however, a document may also provide safety test specifications in addition to usage, installation, and maintenance requirements. In such cases, the document would be retained as an appropriate test standard based on the safety test specifications.

Finally, a document may not be considered an appropriate test standard if the document covers products for which OSHA does not require testing and certification (NRTL Program Directive, Ch. 2.VIII.C.2). Similarly, a document that covers electrical product components would not be considered an appropriate test standard. These documents apply to types of components that have limitation(s) or condition(s) on their use, which are not appropriate for use as end-use products. These documents also specify that these types of components are for use only as part of an end-use product. NRTLs, however, evaluate such components only in the context of evaluating whether end-use products requiring NRTL approval are safe for use in the workplace. Accordingly, as a matter of policy, OSHA considers that documents

covering such components are not appropriate test standards under the NRTL Program. OSHA notes, however, that it is not proposing to delete from NRTLs' scope of recognition any test standards covering end-use products that contain such components.

In addition, OSHA notes that, to conform to a test standard covering an end-use product, a NRTL must still determine that the components in the product comply with the components' specific test standards. In making this determination, NRTLs may (within the confines of the requirements of Annex B, Section 7.4 G and H of the NRTL Program Policies, Procedures, and Guidelines, OSHA Instruction CPL 01–00–004 (Oct. 1, 2019) (the NRTL Program Directive, available at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_01-00-004.pdf)) test the components themselves or accept the testing of a qualified testing organization that a given component conforms to the particular test standard. OSHA reviews each NRTL's procedures to determine which approach the NRTL will use to address components and reviews the end-use product testing to verify that the NRTL appropriately addresses that product's components.

II. Summary of Proposed Actions

In a July 12, 2023 **Federal Register** notice (88 FR 44406, referred to in this

notice as “Proposed Modification,” and available at www.regulations.gov under Docket ID OSHA–2013–0012–0030), OSHA proposed to delete several test standards from the NRTL Program's list of appropriate test standards; incorporate two replacement standards into the NRTL Program's list of appropriate test standards; remove deleted test standards from the scopes of recognition of several NRTLs; and add to the scopes of recognition of some of these NRTLs replacement test standards, as applicable. The notice requested public comment on the proposal; however, no comments were received in response to the **Federal Register** notice. As will be explained below, OSHA is issuing a final decision on these matters as proposed, without modification.

III. Final Decision To Remove Test Standards From the NRTL Program's List of Appropriate Test Standards

In this notice, OSHA announces the final decision to delete several withdrawn test standards from the NRTL Program's List of Appropriate Test Standards. OSHA also announces the final decision to incorporate into the NRTL Program's List of Appropriate Test Standards two replacement test standards. These final actions are detailed below in Table 1.

TABLE 1—TEST STANDARDS OSHA IS REMOVING FROM NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS

Deleted test standard	Test standard title	Reason for deletion	Replacement standard
ANSI/AAMI ES60601–1:2005/(R)2012.	Medical Electrical Equipment, Part 1: General Requirements for Basic Safety and Essential Performance (with amendments).	Standard has been amended by a SDO.	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
AAMI ES60601–1:2005/(R)2012 ...	Medical Electrical Equipment, Part 1: General Requirements for Basic Safety and Essential Performance (with amendments).	Standard has been amended by a SDO.	
AAMI ES60601–1	Medical Electrical Equipment, Part 1: General Requirements for Basic Safety and Essential Performance (with amendments).	Standard has been amended by a SDO.	
UL 60601–1	Medical Electrical Equipment, Part 1: General Requirements for Safety.	Withdrawn	None.
UL 60730–1A	Automatic Electrical Controls for Household and Similar Use; Part 1: General Requirements.	Standard has been amended by a SDO.	UL 60730–1 Automatic Electrical Controls—Part 1: General Requirements.
IEEE C37.013	AC High-Voltage Generator Circuit Breakers Rated on a Symmetrical Current Basis.	Withdrawn	
IEEE C37.46	Power Fuses and Fuse Disconnecting Switches.	Withdrawn	None.
IEEE C37.47	Distribution Fuse Disconnecting Switches, Fuse Supports, and Current-Limiting Fuses.	Withdrawn	None.
ISA 82.02.02	Electrical Equipment for Measurement, Control and Laboratory Use.	Withdrawn	None.

TABLE 1—TEST STANDARDS OSHA IS REMOVING FROM NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS—Continued

Deleted test standard	Test standard title	Reason for deletion	Replacement standard
NFPA 16	Installation of Foam Water Sprinkler and Foam-Water Spray Systems.	Withdrawn	None.
UL 17	Vent or Chimney Connector Dampers for Oil-Fired Appliances.	Withdrawn	None.
UL 250	Household Refrigerators and Freezers.	Withdrawn	None.
UL 474	Dehumidifiers	Withdrawn	None.
UL 664	Commercial (Class IV) Electric Dry-Cleaning Machines.	Withdrawn	None.
UL 745–2–5	Particular Requirements for Circular Saws and Circular Knives.	Withdrawn	None.
UL 745–2–14	Particular Requirements for Planers.	Withdrawn	None.
UL 745–2–35	Particular Requirements for Drain Cleaners.	Withdrawn	None.
UL 873	Electrical Temperature-Indicating and -Regulating Equipment.	Withdrawn	None.
UL 984	Hermetic Refrigerant Motor-Compressors.	Withdrawn	None.
UL 1028	Electric Hair-Clipping and -Shaving Appliances.	Withdrawn	None.
UL 1054	Special-Use Switches	Withdrawn	None.
UL 1626	Residential Sprinklers for Fire Protection Service.	Withdrawn	None.
UL 1662	Electric Chain Saws	Withdrawn	None.
UL 1767	Early-Suppression Fast-Response Sprinklers.	Withdrawn	None.
UL 65	Electric Wired Cabinets	Withdrawn	None.
UL 508C	Power Conversion Equipment	Withdrawn	None.

IV. Final Decision To Modify Affected NRTLs' Scope of Recognition

In this notice, OSHA announces the final decision to remove test standards (those listed in Table 1, above) from the

scopes of recognition of several NRTLs and to add to the scopes of recognition of some of these NRTLs replacement test standards, as applicable. The tables in this section (Table 2 through Table 16) list, for each affected NRTL, the test

standard(s) that OSHA is removing from the scope of recognition of the NRTL, along with the test standard(s) that OSHA will incorporate into the scope of recognition to replace withdrawn (and deleted) test standards, as applicable.

TABLE 2—TEST STANDARD OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF BUREAU VERITAS CONSUMER PRODUCTS SERVICES, INC.

Test standard being removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.

TABLE 3—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF CSA GROUP TESTING & CERTIFICATION INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
AAMI ES 60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 60730–1A	Standard has been amended by a SDO	UL 60730–1 Automatic Electrical Controls—Part 1: General Requirements.
IEEE C37.013	Withdrawn	None.
IEEE C37.46	Withdrawn	None.
IEEE C37.47	Withdrawn	None.
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.
UL 508C	Withdrawn	None.

TABLE 3—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF CSA GROUP TESTING & CERTIFICATION INC.—Continued

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
UL 664	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 873	Withdrawn	None.
UL 984	Withdrawn	None.
UL 1028	Withdrawn	None.
UL 1054	Withdrawn	None.
UL 1662	Withdrawn	None.

TABLE 4—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE RECOGNITION OF DEKRA CERTIFICATION INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
AAMI 60601–1	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.

TABLE 5—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF EUROFINs ELECTRICAL AND ELECTRONIC TESTING NA, INC. A/K/A MET LABORATORIES, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.
UL 508C	Withdrawn	None.
UL 664	Withdrawn	None.
UL 745–2–5	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 1028	Withdrawn	None.
UL 1054	Withdrawn	None.
UL 1662	Withdrawn	None.

TABLE 6—TEST STANDARDS OSHA IS REMOVING FROM THE SCOPE OF RECOGNITION OF FM APPROVALS

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ISA 82.02.02	Withdrawn	None.
UL 664	Withdrawn	None.

TABLE 7—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF INTERTEK TESTING SERVICES NA, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 60730–1A	Standard has been amended by a SDO	UL 60730–1 Automatic Electrical Controls—Part 1: General Requirements.
IEEE C37.013	Withdrawn	None.
IEEE C37.46	Withdrawn	None.
ISA 82.02.02	Withdrawn	None.
UL 17	Withdrawn	None.
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.

TABLE 7—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF INTERTEK TESTING SERVICES NA, INC.—Continued

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
UL 508C	Withdrawn	None.
UL 664	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 873	Withdrawn	None.
UL 984	Withdrawn	None.
UL 1028	Withdrawn	None.
UL 1054	Withdrawn	None.
UL 1662	Withdrawn	None.

TABLE 8—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF NEMKO NORTH AMERICA, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 250	Withdrawn	None.

TABLE 9—TEST STANDARDS OSHA IS REMOVING FROM THE SCOPE OF RECOGNITION OF NSF INTERNATIONAL

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 873	Withdrawn	None.

TABLE 10—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF QAI LABORATORIES, LTD

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
AAMI ES60601–1	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.

TABLE 11—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF QPS EVALUATION SERVICES, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES 60601–1: 2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.

TABLE 12—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF SGS NORTH AMERICA, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.

TABLE 12—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF SGS NORTH AMERICA, INC.—Continued

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
UL 1028	Withdrawn	None.

TABLE 13—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF TÜV RHEINLAND OF NORTH AMERICA, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 60730–1A	Standard has been amended by a SDO	UL 60730–1 Automatic Electrical Controls—Part 1: General Requirements.
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.
UL 508C	Withdrawn	None.
UL 664	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 984	Withdrawn	None.
UL 1028	Withdrawn	None.
UL 1054	Withdrawn	None.
UL 1662	Withdrawn	None.

TABLE 14—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF TÜV SÜD AMERICA, INC.

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 60730–1A	Standard has been amended by a SDO	UL 60730–1 Automatic Electrical Controls—Part 1: General Requirements.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.
UL 508c	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 873	Withdrawn	None.
UL 984	Withdrawn	None.
UL 1028	Withdrawn	None.
UL 1662	Withdrawn	None.

TABLE 15—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF TÜV SÜD PRODUCT SERVICES GMBH

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
UL 60601–1	Withdrawn	None.
UL 60730–1A	Standard has been amended by a SDO	UL 60730–1 Automatic Electrical Controls—Part 1: General Requirements.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 873	Withdrawn	None.

TABLE 16—TEST STANDARDS OSHA IS REMOVING FROM/ADDING TO THE SCOPE OF RECOGNITION OF UL LLC

Test standard to be removed	Reason for removal	Replacement test standard(s) (if applicable)
ANSI/AAMI ES60601–1:2005/(R)2012	Standard has been amended by a SDO	ANSI/AAMI ES 60601–1 Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 60601–1	Withdrawn	None.
UL 60730–1A	Standard has been amended by a SDO	UL 61730–1 Already in UL's Scope of Recognition.
IEEE C37.013	Withdrawn	None.
IEEE C37.46	Withdrawn	None.
IEEE C37.47	Withdrawn	None.
UL 17	Withdrawn	None.
UL 65	Withdrawn	None.
UL 250	Withdrawn	None.
UL 474	Withdrawn	None.
UL 508C	Withdrawn	None.
UL 664	Withdrawn	None.
UL 745–2–14	Withdrawn	None.
UL 745–2–35	Withdrawn	None.
UL 873	Withdrawn	None.
UL 984	Withdrawn	None.
UL 1028	Withdrawn	None.
UL 1054	Withdrawn	None.
UL 1626	Withdrawn	None.
UL 1662	Withdrawn	None.
UL 1767	Withdrawn	None.

OSHA will place on its informational web pages the modifications to each NRTL's scope of recognition. These web pages detail the scope of recognition for each NRTL, including the test standards the NRTL may use to test and certify products under OSHA's NRTL Program. OSHA also will add to the list of "Appropriate Test Standards" web page those test standards added to the NRTL Program's List of Appropriate Test Standards. The agency will add to the "Standards No Longer Recognized" web page those test standards that OSHA no longer recognizes or permits under the NRTL Program. Access to these web pages is available at <http://www.osha.gov/dts/otpc/nrtl/index.html>.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC, on September 6, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–19713 Filed 9–12–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2023–0013]

Element Materials Technology Portland—Evergreen Inc.: Grant of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to grant recognition to Element Materials Technology Portland—Evergreen, Inc. (EMT), for recognition as a Nationally Recognized Testing Laboratory (NRTL). **DATES:** Recognition as a NRTL becomes effective on September 13, 2023.

FOR FURTHER INFORMATION CONTACT:

Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: meilinger.frankis2@dol.gov.

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2300 or email: robinson.kevin@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Many of OSHA's workplace standards require that a NRTL test and certify certain types of equipment as safe for use in the workplace. NRTLs are independent laboratories that meet OSHA's requirements for performing safety testing and certification of products used in the workplace. To obtain and retain OSHA recognition, the NRTLs must meet the requirements in the NRTL Program regulations at 29 CFR 1910.7. More specifically, to be recognized by OSHA, an organization must: (1) have the appropriate capability to test, evaluate, and approve products to assure their safe use in the workplace; (2) be completely independent of employers subject to the tested equipment requirements, and manufacturers and vendors of products for which OSHA requires certification; (3) have internal programs that ensure proper control of the testing and certification process; and (4) have effective reporting and complaint handling procedures. Recognition is an acknowledgement by OSHA that the NRTL has the capabilities to perform independent safety testing and certification of the specific products covered within the NRTL's scope of recognition and is not a delegation or grant of government authority. Recognition of a NRTL by OSHA also allows employers to use products certified by that NRTL to meet those OSHA standards that require product testing and certification.

The agency processes applications for initial recognition following requirements in Appendix A of 29 CFR 1910.7. This appendix requires OSHA to publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application, provides its preliminary findings, and solicits comments on its preliminary findings. In the second notice, the agency provides its final decision on the application and sets forth the NRTL's scope of recognition.

II. Notice of Final Decision

OSHA hereby gives notice of the agency's decision to grant recognition to Element Materials Technology Portland—Evergreen Inc., (EMT) as a NRTL. According to public information (see <https://www.element.com/about-element/>), EMT states that it is an internationally accredited testing laboratory. In its application, EMT lists the current address of its headquarters as: Element Materials Technology Portland—Evergreen Inc., 41 Tesla, Irvine, California 92618. OSHA has determined that EMT has the capability to perform as a NRTL as outlined in 29 CFR 1910.7.

Each NRTL's scope of recognition has two elements: (1) the type(s) of products the NRTL may test, with each type specified by its applicable test standard; and (2) the recognized site(s) that have the technical capability to perform the product-testing and product-certification activities for the applicable test standards within the NRTL's scope of recognition. EMT applied on June 26, 2020, for three recognized sites and thirteen recognized test standards (OSHA–2023–0013–0002). This application was amended on June 28, 2022, to remove two of the three sites and seven of the thirteen standards requested in the original application (OSHA–2023–0013–0003). OSHA published the preliminary notice announcing EMT's application for recognition in the **Federal Register** on July 25, 2023 (88 FR 47914). The agency requested comments by August 24, 2023, but it received no comments in response to this notice. OSHA is now proceeding with this final notice to grant recognition to EMT as a NRTL.

To obtain or review copies of all public documents pertaining to EMT's application, go to www.regulations.gov or contact the Docket Office at (202)

693–2350 (TTY (877) 889–5627). Docket No. OSHA–2023–0013 contains all materials in the record concerning EMT's recognition.

III. Final Decision and Order

OSHA staff performed a detailed analysis of EMT's application packet and reviewed other pertinent information. OSHA staff also performed comprehensive on-site assessments of EMT's testing facility, at EMT Irvine, California on January 18–19, 2023. Based on the review of this evidence, OSHA finds that EMT meets the requirements of 29 CFR 1910.7 for recognition as a NRTL, subject to the limitations and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant recognition to EMT as a NRTL. The following sections set forth the scope of recognition included in EMT's grant of recognition.

A. Standards Requested for Recognition

OSHA limits EMT's scope of recognition to testing and certification of products for demonstration of conformance to the test standards listed in Table 1 below.

TABLE 1—APPROPRIATE TEST STANDARDS FOR INCLUSION IN EMT'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
ANSI/AAMI ES60601–1.	Medical Electrical Equipment—Part 1: General Requirements for Basic Safety and Essential Performance.
UL 61010–1	Electrical Equipment for Measurement, Control and Laboratory Use; Part 1: General Requirements.
UL 61010–2–010	Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–010: Particular Requirements for Laboratory Equipment for the Heating of Materials.
UL 61010–2–081	Standard for Safety Requirements for Electrical Equipment for Measurement, Control, and Laboratory Use—Part 2–081: Particular Requirements for Automatic and Semi-Automatic Laboratory Equipment for Analysis and Other Purposes.
UL 61010–2–101	Safety Requirements for Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–101: Particular Requirements for In Vitro Diagnostic (IVD) Medical Equipment.
UL 62368–1	Audio/Video, Information and Communication Technology Equipment—Part 1: Safety Requirements.

B. Site Requested for Recognition

OSHA limits EMT's scope of recognition to include one site: Element Materials Technology Portland—Evergreen, Inc., 41 Tesla, Irvine, California 92618. OSHA's recognition of this site limits EMT to performing product testing and certifications only for the test standards for which the site has the proper capability and programs, and for the test standards in EMT's scope of recognition.

C. Conditions

In addition to those conditions already required by 29 CFR 1910.7, EMT also must abide by the following conditions of the recognition:

1. EMT must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel,

and of any major change in the operations as a NRTL, and provide details of the change(s);

2. EMT must meet all the terms of the recognition and comply with all OSHA policies pertaining to this recognition; and

3. EMT must continue to meet the requirements for recognition, including all previously published conditions on EMT's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby grants recognition to EMT as a NRTL, subject to these limitations and conditions specified above.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the

preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, September 18, 2020) and 29 CFR 1910.7.

Signed at Washington, DC, on September 6, 2023.

James S. Frederick,
Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–19712 Filed 9–12–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR**Wage and Hour Division****Notice of Approved Agency Information Collection; Information Collection: Requests To Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act****ACTION:** Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA), the Wage and Hour Division (WHD) is providing notice to the public that the WHD sponsored information collection request (ICR) titled, “Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act,” has been approved by the Office of Management and Budget (OMB). WHD is notifying the public that the information collection has been revised and extended effective immediately through September 30, 2026.

DATES: The OMB approval of the revision of this information collection is effective immediately with an expiration date of September 30, 2026.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretations, Wage and Hour, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number) or by sending an email to WHDPRAComments@dol.gov.

Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: The Department of Labor submitted a proposed revision to the information collection titled: Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act (OMB Control Number 1235-0023), in conjunction with a proposed rule published in the **Federal Register** on March 18, 2022 (87 FR 15698) and a final rule. The final rule titled, “Updating the Davis-Bacon and Related Acts Regulations,” published in the **Federal Register** on August 23, 2023 (88 FR 57526). OMB issued a Notice of

Action (NOA) on September 6, 2023, approving the collection and extending the expiration of the collection to September 30, 2026, under OMB Control Number 1235-0023.

Section (k) of 5 CFR 1320.11, “Clearance of Collections of Information in Proposed Rules” states, “After receipt of notification of OMB’s approval, instruction to make a substantive or material change to, disapproval of a collection of information, or failure to act, the agency shall publish a notice in the **Federal Register** to inform the public of OMB’s decision.” This notice fulfills the Department’s obligation to notify the public of OMB’s approval of the information collection request.

Dated: September 7, 2023.

Amy Hunter,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2023-19715 Filed 9-12-23; 8:45 am]

BILLING CODE 4510-27-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40-8903-LA; ASLBP No. 23-980-03-LA-BD01]

Homestake Mining Company of California; Establishment of Atomic Safety and Licensing Board

Pursuant to the Commission’s regulations, *see, e.g.*, 10 CFR 2.103, 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

Homestake Mining Company of California (Denial of License Amendment Request)

This Board is being established pursuant to a September 5, 2023 hearing demand filed by Homestake Mining Company of California (Homestake). Homestake challenges the NRC Staff’s decision in an August 15, 2023 letter denying Homestake’s request to amend its license for the Grants Reclamation Project (License No. SUA-1471) in Cibola County, New Mexico.

The Board is comprised of the following Administrative Judges:

Michael M. Gibson, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001

G. Paul Bollwerk, III, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001

Dr. Sue H. Abreu, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule. *See* 10 CFR 2.302.

Rockville, Maryland.

Dated: September 7, 2023.

Edward R. Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2023-19787 Filed 9-12-23; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF PERSONNEL MANAGEMENT**Submission for Review: OMB Control No. 3206-NEW**

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on the following new information collection request (ICR): 3206-NEW, *USA Hire Assessment Satisfaction Survey, Form USAH-1*.

DATES: Comments are encouraged and will be accepted until October 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting, “Currently under 30-day Review—Open for Public Comments” or by using the search function. Interested persons may also submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to oir_submission@omb.eop.gov or faxed to (202) 395-6974.

FOR FURTHER INFORMATION CONTACT: A copy of this information collection request, with applicable supporting documentation, may be obtained by contacting jeffrey.cain@opm.gov or 202-897-8829. Please put “3206 New” in the subject line of the email.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13), as amended (44 U.S.C. chapter 35), OPM is soliciting comments for this collection. The ICR 3206-NEW *Assessment Satisfaction Survey, Form USAH-1*, administered through USA Hire, is the

Federal Government's centralized source for collecting applicant feedback on the USA Hire online assessment process. This effort will enable USA Hire to implement improvements on an ongoing basis to the assessment process for applicants and agency stakeholders. This new information collection is authorized under 5 U.S.C. 1104, 1302, 3301, 3304, 3320, 3361, 3393, and 3394.

This information collection was previously published in the **Federal Register** on May 2, 2023, at 88 FR 27929 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments. As this is a new collection, OPM invites comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Analysis

Agency: HR Solutions/Federal Staffing Center, Office of Personnel Management.

Title: USA Hire Assessment Satisfaction Survey.

OMB Number: 3206-NEW.

Frequency: Annually.

Affected Public: Individuals.

Number of Respondents: 200,000.

Estimated Time per Respondent: 1 Minute.

Total Burden Hours: 3,400 hours.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2023-19737 Filed 9-12-23; 8:45 am]

BILLING CODE 6325-43-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023-259 and CP2023-262; MC2023-261 and CP2023-264; MC2023-262 and CP2023-265]

New Postal Products

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 14, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any,

can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* MC2023-259 and CP2023-262; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 26 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 6, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 14, 2023.

2. *Docket No(s):* MC2023-261 and CP2023-264; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 50 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 6, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* September 14, 2023.

3. *Docket No(s):* MC2023-262 and CP2023-265; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 51 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 6, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* September 14, 2023.

¹ See Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19-22 (Order No. 4679).

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2023–19723 Filed 9–12–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: Date of notice: September 13, 2023.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 6, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 26 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2023–259 and CP2023–262.

Sarah Sullivan,
Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–19813 Filed 9–12–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–325, OMB Control No. 3235–0385]

Proposed Collection; Comment Request; Extension: Rule 15g–9

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995

(“PRA”) (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) is soliciting comments on the existing collection of information provided for in Rule 15g–9 (17 CFR 240.15g–9) (the “Rule”), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the “Exchange Act”). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Section 15(c)(2) of the Exchange Act (15 U.S.C. authorizes the Commission to promulgate rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative practices in connection with over-the-counter (“OTC”) securities transactions. Pursuant to this authority, the Commission in 1989 adopted Rule 15c2–6, which was subsequently redesignated as Rule 15g–9, 17 CFR 240.15g–9. The Rule requires broker-dealers to produce a written suitability determination for, and to obtain a written customer agreement to, certain recommended transactions in penny stocks that are not registered on a national securities exchange, and whose issuers do not meet certain minimum financial standards. The Rule is intended to prevent the indiscriminate use by broker-dealers of fraudulent, high pressure telephone sales campaigns to sell penny stocks to unsophisticated customers.

The Commission staff estimates that approximately five percent of registered broker-dealers, or 175 broker-dealers,¹ are subject to the Rule (5% × approximately 3,497 registered broker-dealers = 175 broker-dealers). As indicated above, the burden of the Rule on a respondent varies widely depending on the frequency with which new customers are solicited. On average, for all respondents, the staff has estimated that respondents process three new customers per week, or approximately 156 new customers requiring suitability determinations per year. We also estimate that a broker-dealer would take approximately one-half hour per new customer in obtaining, reviewing, and processing (including transmitting to the customer) the information required by Rule 15g–9, and each respondent would consequently spend 78 hours annually (156 new customers × .5 hours) obtaining the information required in the Rule. This would result in 27,300 annual responses per year for all respondents (175 respondents × 156

¹ As of July 1, 2023, there are 3,497 registered broker-dealers. 5% of 3,497 is 174.85, rounded up to 175.

new customer suitability determinations per year). We determined, based on the estimate of 175 broker-dealer respondents, that the annual hour burden of Rule 15g–9 is 13,650 hours (175 respondents × 78 hours).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission’s estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 13, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: September 8, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–19790 Filed 9–12–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–048, OMB Control No. 3235–0063]

Submission for OMB Review; Comment Request; Extension: Exchange Act Form 10–K

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street, NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 10-K (17 CFR 249.310) is filed by issuers of securities to satisfy their annual reporting obligations under to Section 13 or 15(d) of the Exchange Act ("Exchange Act") (15 U.S.C. 78m or 78o(d)). The information provided by Form 10-K is intended to ensure the adequacy of information available to investors and securities markets about an issuer. Form 10-K takes approximately 2,249,366 hours per response to prepare and is filed by approximately 8,292 respondents. We estimate that 75% of the approximately hours per response (1,687.025 hours) is prepared by the company for an annual reporting burden of 13,988,811 hours (1,687.025 hours per response × 8,292 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by October 13, 2023 to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: September 8, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-19791 Filed 9-12-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-096, OMB Control No. 3235-0151]

Proposed Collection; Comment Request; Extension: Rule 17Ac3-1(a) and Form TA-W

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission

("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the previously approved collection of information provided for in Rule 17Ac3-1(a) (17 CFR 240.17Ac3-1(a)) and Form TA-W (17 CFR 249b.101), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Section 17A(c)(4)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(B)) authorizes transfer agents registered with an appropriate regulatory agency ("ARA") to withdraw from registration by filing with the ARA a written notice of withdrawal and by agreeing to such terms and conditions as the ARA deems necessary or appropriate in the public interest, for the protection of investors, or in the furtherance of the purposes of Section 17A.

In order to implement Section 17A(c)(4)(B) of the Exchange Act, the Commission promulgated Rule 17Ac3-1(a) and accompanying Form TA-W on September 1, 1977. Rule 17Ac3-1(a) provides that notice of withdrawal of registration as a transfer agent with the Commission shall be filed on Form TA-W. Form TA-W requires the withdrawing transfer agent to provide the Commission with certain information, including: (1) the locations where transfer agent activities are or were performed; (2) the reasons for ceasing the performance of such activities; (3) disclosure of unsatisfied judgments or liens; and (4) information regarding successor transfer agents.

The Commission uses the information disclosed on Form TA-W to determine whether the registered transfer agent applying for withdrawal from registration as a transfer agent should be allowed to deregister and, if so, whether the Commission should attach to the granting of the application any terms or conditions necessary or appropriate in the public interest, for the protection of investors, or in furtherance of the purposes of Section 17A of the Exchange Act. Without Rule 17Ac3-1(a) and Form TA-W, transfer agents registered with the Commission would not have a means to voluntarily deregister if it is necessary or appropriate to do so.

On average, respondents have filed approximately 50 TA-Ws with the Commission annually from 2020 to 2023. A Form TA-W filing occurs only once, when a transfer agent is seeking deregistration. In view of the readily available information requested by Form TA-W, its short and simple presentation, and the Commission's experience with the filers, we estimate

that approximately 30 minutes is required to complete and file Form TA-W. Thus, the total annual time burden to the transfer agent industry is approximately 25 hours (50 filings × 0.5 hours). We estimate that the internal labor cost of compliance per filing is \$39 (0.5 hours × \$78 average hourly rate for clerical staff time).¹ Thus, the total internal compliance cost per year is thus approximately \$975 (25 hours × \$39 = \$975).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by November 13, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: September 8, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-19789 Filed 9-12-23; 8:45 am]

BILLING CODE 8011-01-P

¹ The \$78 per hour figure for clerical staff time is from SIFMA's *Office Salaries in the Securities Industry 2013*, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98318; File No. SR–BX–2023–021]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 13 Concerning PRISM

September 7, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on August 30, 2023, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 3, Section 13, Price Improvement Auction (“PRISM”).

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/bx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Options 3, Section 13, Price Improvement Auction (“PRISM”). Specifically, the Exchange proposes to

amend Options 3, Section 13(i)(A) through (C) to harmonize the language within the PRISM entry checks with language within Nasdaq GEMX, LLC’s (“GEMX”) PIM, Nasdaq ISE, LLC’s (“ISE”) PIM, Nasdaq MRX, LLC’s (“MRX”) PIM, and Nasdaq Phlx LLC’s (“Phlx”) PIXL, without changing the substantive operations of these price improvement auctions. The Exchange believes that by utilizing similar language, Participants will be able to compare BX’s PRISM entry checks with similar mechanisms on Nasdaq affiliated markets.

BX proposes to add “a price that is” to the end of Options 3, Section 13(i)(A) and add new subparagraphs (1) and (2) to distinguish opposite and same side checks. The opposite side check is currently spelled out in the current rule text, however the same side check does not specify the NBBO check. Today, if the PRISM Order is for less than 50 option contracts, and if the difference between the NBBO or the internal BBO is \$0.01, the Initiating Participant must stop the entire PRISM Order at a price that is, on the same side of the market as the PRISM Order, equal to or better than the NBBO³ and better than any Limit Order or quote on the Limit Order book. The Exchange believes that the addition of the NBBO check will add clarity to the rule text concerning same side price checks because the NBBO check is always relevant in the same side check to avoid a trade-through. The Exchange also proposes to capitalize “Limit Order,” and remove other extraneous words as the sentence has been rearranged. The Exchange notes that this rule text represents current System functionality.

The Exchange proposes to amend Options 3, Section 13(i)(B) to distinguish opposite and same side checks and add a semicolon to the end of Options 3, Section 13(i)(B). The opposite side check is currently spelled out in the current rule text, however the same side check does not specify the NBBO check. Today, if the PRISM Order is for the account of a Public Customer and such order is for 50 option contracts or more, or if the difference between the NBBO or the internal BBO is greater than \$0.01, the Initiating Participant must stop the entire PRISM Order at a price that is, on the same side of the market as the PRISM Order, at least \$0.01 better than any Limit Order or

quote on the Limit Order book and equal to or better than the NBBO. The Exchange believes that the addition of the NBBO check will add clarity to the rule text because the NBBO check is always relevant in the same side check to avoid a trade-through. The Exchange also proposes to capitalize “Limit Order,” and remove other extraneous words as the sentence has been rearranged. The Exchange notes that this rule text represents current System functionality.

The Exchange proposes to amend Options 3, Section 13(i)(C) to distinguish opposite and same side checks and add a semicolon to the end of Options 3, Section 13(i)(C). The opposite side check is not currently delineated in the rule text. The Exchange proposes to provide that if the PRISM Order is for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more, or if the difference between the NBBO or the internal BBO is greater than \$0.01, the Initiating Participant must stop the entire PRISM Order at a price that is equal to or better than the internal BBO and NBBO on the opposite side of the market from the PRISM Order. The Exchange notes that this rule text represents current System functionality. The Exchange also proposes to reword the current rule text related to the same side check to provide that if the PRISM Order is for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more, or if the difference between the NBBO or the internal BBO is greater than \$0.01, the Initiating Participant must stop the entire PRISM Order at a price that is, on the same side of the market as the PRISM Order, at least \$0.01 better than any Limit Order or quote on the Limit Order book, and equal to or better than the NBBO. The Exchange notes that this rule text represents current System functionality. The current rule text indicates that the PRISM Order must be stopped at a price that is the better of the BX BBO improved by at least \$0.01 or the PRISM Order’s limit price on the same side of the market as the PRISM Order, provided in either case that such price is at or better than the NBBO. Because the language is the “better of” the Exchange notes that the proposed language, which conforms to similar language utilized on other Nasdaq affiliated markets, describes the same price checks and adds the NBBO check which is currently missing.

³ For example, if the market is 0.98 bid and 0.99 offer, a Public Customer PRISM Order to buy for less than 50 contracts must be stopped at 0.98 cents in this scenario to be accepted into a PRISM Auction, provided there is no resting order or quote on the BX order book at 0.98 in which case the PRISM Order would be rejected.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,⁴ in general, and furthers the objectives of section 6(b)(5) of the Act,⁵ in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest.

The Exchange's proposal to amend Options 3, Section 13(i)(A) through (C) to harmonize the language within the PRISM entry checks with language within GEMX's PIM, ISE's PIM, MRX's PIM, and Phlx's PIXL, without changing the substantive operations of these price improvement auctions, is consistent with the Act and the protection of investors and the general public because by utilizing similar language Participants will be able to compare BX's PRISM entry checks with similar mechanisms on Nasdaq affiliated markets.

BX's proposal to amend Options 3, Section 13(i)(A) to distinguish opposite and same side checks, and add the NBBO check to the same side price check is consistent with the Act and the protection of investors and the general public because the NBBO check is always relevant in the same side check to avoid a trade-through. The Exchange believes that the addition of the NBBO check will add clarity to the rule text because the NBBO check is always relevant in the same side check to avoid a trade-through. The remainder of the changes are non-substantive.

BX's proposal to amend Options 3, Section 13(i)(B) to distinguish opposite and same side checks, and add the NBBO check to the same side price check is consistent with the Act and the protection of investors and the general public because the NBBO check is always relevant in the same side check to avoid a trade-through. The Exchange believes that the addition of the NBBO check will add clarity to the rule text because the NBBO check is always relevant in the same side check to avoid a trade-through. The remainder of the changes are non-substantive.

BX's proposal to amend Options 3, Section 13(i)(C) to distinguish opposite and same side checks, and add the opposite side check to the rule text is consistent with the Act and the protection of investors and the general public. The opposite side check must be equal to or better than the NBBO and any non-displayed order on the Exchange's order book to avoid a trade-through. Also, the NBBO check is

always relevant in the same side check to avoid a trade-through. Rewording the current rule text related to the same side check to provide that if the PRISM Order is for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more, or if the difference between the NBBO or the internal BBO is greater than \$0.01, the Initiating Participant must stop the entire PRISM Order at a price that is on the same side of the market as the PRISM Order, at least \$0.01 better than any Limit Order or quote on the Limit Order book, and equal to or better than the NBBO is consistent with the Act and the protection of investors and the general public. The proposed rule text describes the same price checks as the current rule while conforming the rule text to similar language utilized on other Nasdaq affiliated markets. Additionally, the proposed rule text adds the NBBO check which is always relevant in the same side check to avoid a trade-through. The Exchange believes that the addition of the NBBO check will add clarity to the rule text because the NBBO check is always relevant in the same side check to avoid a trade-through. The Exchange notes that this rule text represents current System functionality.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

BX's proposal to amend Options 3, Section 13(i)(A) through (C) to harmonize the language within the PRISM entry checks with language within GEMX's PIM, ISE's PIM, MRX's PIM, and Phlx's PIXL, without changing the substantive operations of these price improvement auctions, does not impose an undue burden on competition because market participants will be able to compare BX's PRISM entry checks with similar mechanisms on Nasdaq affiliated markets.

Amending Options 3, Section 13(i)(A) through (C) to specify the entry checks that are utilized by BX's System today to initiate a PRISM does not impose an undue burden on competition because these checks will apply uniformly to any order entered into PRISM. Further, the proposed amendments will add transparency to the current System functionality, which is not being substantively amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act⁶ and Rule 19b-4(f)(6) thereunder.⁷

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-BX-2023-021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-BX-2023-021. This file number should be included on the

⁶ 15 U.S.C. 78s(b)(3)(A).

⁷ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BX-2023-021 and should be submitted on or before October 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-19730 Filed 9-12-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-156, OMB Control No. 3235-0288]

Submission for OMB Review; Comment Request; Extension: Form 20-F

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget this

request for extension of the previously approved collection of information discussed below.

Form 20-F (17 CFR 249.220f) is used to register securities of foreign private issuers pursuant to Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78l) or as annual and transitional reports pursuant to Sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m(a) and 78o(d)). The information required in the Form 20-F is used by investors in making investment decisions with respect to the securities of such foreign private issuers. We estimate that Form 20-F takes approximately 2,629.92 hours per response and is filed by approximately 729 respondents. We estimate that 25% of the 2,629.92 hours per response (657.48 hours) is prepared by the issuer for a total reporting burden of 479,303 (657.48 hours per response × 729 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by October 13, 2023 to (i) www.reginfo.gov/public/do/PRAMain and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street, NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: September 8, 2023.

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-19792 Filed 9-12-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98317; File No. SR-FINRA-2022-033]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Codes of Arbitration Procedure To Make Various Clarifying and Technical Changes to the Codes, Including in Response to Recommendations in the Report of Independent Counsel Lowenstein Sandler LLP

September 7, 2023.

I. Introduction

On December 23, 2022, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes³ ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes⁴ ("Industry Code") (together, "Codes"). The proposed rule change, as modified by Amendment No. 1 (defined below), would amend provisions of the Codes governing the arbitrator list-selection process to: (1) exclude arbitrators from the arbitrator ranking lists based on certain conflicts of interest;⁵ (2) permit the removal of an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins;⁶ and (3) provide parties with a written explanation of the decision by the Director of FINRA Dispute Resolution Services ("DRS Director")⁷ to grant or deny a request to remove an arbitrator.⁸ In addition, the proposed rule change, as modified by Amendment No. 1, would amend procedural rules in the Codes, such as those pertaining to holding prehearing conferences and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See FINRA Rule 12000 Series (Code of Arbitration Procedure for Customer Disputes).

⁴ See FINRA Rule 13000 Series (Code of Arbitration Procedure for Industry Disputes).

⁵ See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

⁶ See proposed Rules 12407(a), 13410(a).

⁷ Unless the Codes provide otherwise, the DRS Director may delegate their duties when it is appropriate. FINRA Rule 12103 (Director of FINRA Dispute Resolution Services).

⁸ See proposed Rules 12407(c), 13410(c).

⁸ 17 CFR 200.30-3(a)(12).

hearing sessions,⁹ initiating and responding to claims,¹⁰ motion practice,¹¹ claim and case dismissals,¹² and providing a hearing record.¹³

The proposed rule change was published for comment in the **Federal Register** on January 12, 2023.¹⁴ On February 14, 2023, FINRA consented to extend until April 12, 2023, the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.¹⁵ The Commission received five comment letters in response to the Notice.¹⁶ On April 11, 2023, FINRA responded to the comment letters received in response to the Notice and filed an amendment to the proposed rule change (“Amendment No. 1”).¹⁷ On April 12, 2023, the Commission published a notice of filing of Amendment No. 1 and an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 (hereinafter referred to as the “proposed rule change” unless otherwise specified).¹⁸ The Commission received two comment letters in response to that notice and order.¹⁹ On July 3, 2023, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to September 8, 2023.²⁰ On August 10,

2023, the Commission received a letter from FINRA responding to comments received in response to the Order Instituting Proceedings prior to that date.²¹ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

A. Background

FINRA’s Dispute Resolution Services (“DRS”) provides a forum for disputes between customers, member firms, and associated persons of member firms through two non-judicial proceedings: arbitration²² and mediation.²³ FINRA’s arbitration forum accommodates two broad categories of proceedings, and each has its own rules of procedure. The Customer Code governs any dispute between a customer and a member or associated person.²⁴ The Industry Code governs any dispute exclusively among associated persons and/or member firms.²⁵ The Codes govern all aspects of an arbitration claim, including: initiating and responding to claims; appointment, disqualification, and authority of arbitrators; prehearing procedures and discovery; and hearings, evidence, and closing the record.²⁶

In particular, the Codes govern the number of arbitrators on a panel for a

proceeding based, in part, on the value of the underlying claim.²⁷ If the amount of a claim is \$50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator²⁸ who will decide the claim based solely on the written pleadings and other materials submitted by the parties (“Simplified Arbitration”).²⁹ If the amount of a claim is greater than \$50,000 but not more than \$100,000, exclusive of interest and expenses, the panel will consist of one arbitrator (unless the parties agree in writing to a three-arbitrator panel) who will decide the claim after a hearing.³⁰ If the amount of a claim is more than \$100,000 (exclusive of interest and expenses), is unspecified, or does not request money damages, the panel will consist of three arbitrators (unless the parties agree in writing to one arbitrator) who will decide the claim after a hearing.³¹

FINRA maintains a roster for each of the three types of arbitrators that may be appointed to a panel: public, non-public, and chairperson arbitrators.³² In general, a “public” arbitrator is a person who is otherwise qualified to serve as an arbitrator and is not disqualified from service as a public arbitrator due to their current or past ties to the financial industry.³³ A “non-public” arbitrator is a person who is otherwise qualified to serve as an arbitrator and is disqualified from service as a public arbitrator due to their current or previous association with the financial industry.³⁴ An arbitrator is eligible to serve as a “chairperson” if she has completed FINRA’s chairperson training and (1) has a law degree, is a member of a bar of at least one jurisdiction, and has served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization (“SRO”) in which hearings were held or (2) has served as an arbitrator through award on

⁹ See proposed Rules 12500(b), 12501(c), 12504(a)(5), 12600(b), 12800(c)(3)(B)(i), 13500(b), 13501(c), 13504(a), 13600(b), 13800(c)(3)(B)(i).

¹⁰ See proposed Rules 12303(b), 12309, 13303(b), 13309.

¹¹ See proposed Rules 12503, 13503.

¹² See proposed Rules 12700(b), 13700(b).

¹³ See proposed Rules 12606(a)(2), 12606(b)(2), 13606(a)(2), 13606(b)(2).

¹⁴ See Exchange Act Release No. 96607 (Jan. 6, 2023), 88 FR 2144 (Jan. 12, 2023) (File No. SR-FINRA-2022-033) (hereinafter, the “Notice”).

¹⁵ See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Trading and Markets, U.S. Securities and Exchange Commission (Feb. 14, 2023), <https://www.finra.org/sites/default/files/2023-02/sr-finra-2022-033-extension-no-1.pdf>.

¹⁶ The comment letters are available at <https://www.sec.gov/comments/sr-finra-2022-033/srfinra2022033.htm>.

¹⁷ See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Apr. 11, 2023) (“FINRA April Letter”), <https://www.sec.gov/comments/sr-finra-2022-033/srfinra2022033-20164047-333995.pdf>.

¹⁸ Exchange Act Release No. 97291 (Apr. 12, 2023), 88 FR 23720 (Apr. 18, 2023) (File No. SR-FINRA-2022-033) (“Order Instituting Proceedings”).

¹⁹ See *supra* note 16.

²⁰ See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel,

Division of Trading and Markets, U.S. Securities and Exchange Commission (July 3, 2023), <https://www.finra.org/sites/default/files/2023-07/sr-finra-2022-033-extension-no2.pdf>.

²¹ See letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Aug. 10, 2023) (“FINRA August Letter”), <https://www.sec.gov/comments/sr-finra-2022-033/srfinra2022033-242999-511962.pdf>.

²² See FINRA Rules 12101(a) (Applicability of [Customer] Code), 13101(a) (Applicability of [Industry] Code).

²³ See FINRA Rule 14000 Series (Code of Mediation Procedure) (“Mediation Code”). Because the proposed rule change would amend the Customer Code and Industry Code, and not the Mediation Code, this order does not provide background on the mediation process.

²⁴ See FINRA Rules 12200, 12201. Under FINRA Rule 12200, parties must arbitrate disputes about the non-insurance business activity of a member or associated person if the customer requests arbitration or arbitration is required by written agreement; under FINRA Rule 12201, parties may agree in writing to arbitrate their disputes about the non-insurance business activity of a member or associated person.

²⁵ See FINRA Rules 13101 (Industry Code applies to any dispute filed under Rules 13200, 13201, or 13202), 13200 (requiring arbitration “if the dispute arises out of the [non-insurance] business activities of a member or an associated person and is between or among” members and/or associated persons), 13201 (permitting arbitration of employment discrimination, whistleblower, and sexual misconduct cases), 13202 (requiring arbitration if the dispute involves the business activity of a registered clearing agency that has entered into an agreement to use FINRA’s arbitration forum).

²⁶ See FINRA Customer Code (FINRA Rule 12000 Series), Parts III–VI; FINRA Industry Code (FINRA Rule 13000 Series), Parts III–VI.

²⁷ See FINRA Rules 12401, 13401.

²⁸ See FINRA Rules 12401(a), 13401(a). Alternatively, parties may agree in writing to have a three-person panel decide their simplified case. See FINRA Rules 12800(b), 13800(b).

²⁹ See FINRA Rules 12401(a), 13401(a). Simplified Arbitration is governed by FINRA Rule 12800 (Simplified Arbitration) or FINRA Rule 13800 (Simplified Arbitration), respectively. In general, no hearing will be held in Simplified Arbitration unless the customer or claimant requests a hearing. FINRA Rules 12800(c)(1), 13800(c)(1).

³⁰ See FINRA Rules 12401(b), 13401(b); see also FINRA Rules 12600(a), 13600(a) (hearing is required unless it is a Simplified Arbitration or default proceeding).

³¹ See FINRA Rules 12401(c), 13401(c); see also FINRA Rules 12600(a), 13600(a) (hearing is required unless it is a Simplified Arbitration or default proceeding).

³² See FINRA Rules 12400(b), 13400(b).

³³ See FINRA Rules 12100(aa), 13100(x).

³⁴ See FINRA Rules 12100(t), 13100(r).

at least three arbitrations administered by a SRO in which hearings were held.³⁵

B. The Arbitrator-Selection Process

Whatever the size of the claim or nature of the dispute, the arbitrator-selection process typically follows the same steps for each proceeding: (1) the Neutral List Selection System (“NLSS”), a computerized list-selection algorithm, randomly generates a list (or lists) of arbitrators from DRS’s rosters of eligible arbitrators for the selected hearing location for each proceeding;³⁶ (2) the DRS Director sends the list(s) to the parties;³⁷ (3) the parties exercise limited strikes to eliminate candidates from the list(s);³⁸ (4) the parties express preferences by ranking the remaining candidates on the list(s);³⁹ and (5) the DRS Director combines the strike and ranking lists to identify and appoint the arbitrator(s) to the panel.⁴⁰

For example, for a customer claim of \$100,000 or less, the NLSS would generate one list of 10 public arbitrators from the chairperson roster.⁴¹ For a customer claim of more than \$100,000, the NLSS would generate three lists: one with 10 chair-qualified public arbitrators; one with 15 public arbitrators; and one with 10 non-public

arbitrators.⁴² After each party exercises limited strikes against each list and ranks the remaining arbitrators on each list in order of preference,⁴³ the DRS Director consolidates the strike and ranking lists and appoints the highest-ranking arbitrator(s) who survived the parties’ strikes.⁴⁴

The arbitrator-selection process differs in industry disputes. For an industry claim of \$100,000 or less, the NLSS would generate one list of 10 arbitrators from the chairperson roster.⁴⁵ For an industry claim of more than \$100,000 between members, the NLSS would generate two lists: one with 10 chair-qualified non-public arbitrators; and one with 20 non-public arbitrators.⁴⁶ For an industry claim of more than \$100,000 between associated persons or between or among members and associated persons, the NLSS would generate three lists: one with 10 chair-qualified public arbitrators; one with 10 public arbitrators; and one with 10 non-public arbitrators.⁴⁷ Once the DRS Director sends the NLSS-generated list(s) to the parties, each party exercises limited strikes against the list(s) and ranks the remaining arbitrators in order of preference.⁴⁸ The DRS Director then consolidates the strike and ranking

list(s) and appoints the highest-ranking arbitrator(s) who survived the parties’ strikes.⁴⁹

C. The Lowenstein Report

In a January 2022 order, a Georgia trial court vacated a FINRA arbitration award, finding (among other things) that FINRA had a “secret agreement” with an attorney to remove certain arbitrators from any lists generated in that attorney’s cases.⁵⁰ The trial court concluded that such an agreement “calls into question the entire fairness” of FINRA’s arbitration forum.⁵¹ The Court of Appeals of Georgia subsequently reversed the trial court’s order, holding (among other things) that “there is no evidence that [a secret] agreement was at play here” given that the arbitrator in question appeared on the ranking list notwithstanding the alleged existence of a “secret agreement” to exclude him.⁵²

Prior to the order’s reversal on appeal, the Audit Committee of FINRA’s Board of Governors engaged a law firm, Lowenstein Sandler LLP (“Lowenstein”), to: (1) independently review the trial court’s finding about the arbitrator-selection process in that case; and (2) “determine generally whether any improvements to the arbitrator selection process [are] necessary to ensure neutrality and improve DRS’s transparency.”⁵³ Lowenstein began its review in February 2022, and in June 2022, it delivered a 37-page report.⁵⁴ The Lowenstein Report concluded that there was not any agreement between the attorney and FINRA regarding the panels for that attorney’s cases.⁵⁵ “Nonetheless, . . . Lowenstein identified a series of potential improvements to the FINRA arbitrator selection process intended to increase transparency and ensure neutrality in the work undertaken by DRS.”⁵⁶

In response to the recommendations made in the Lowenstein Report, FINRA proposed amendments to its arbitrator list-selection process, as well as additional changes to its procedural

³⁵ See FINRA Rules 12400(c), 13400(c). In customer disputes, the chairperson must be a public arbitrator. See FINRA Rule 12400(c).

³⁶ See FINRA Rules 12402(b) (Generating Lists in Customer Cases with One Arbitrator), 12403(a) (Generating Lists in Customer Cases with Three Arbitrators), 13403(a) (Lists Generated in Disputes Between Members), 13403(b) (Lists Generated in Disputes Between Associated Persons or Between or Among Members and Associated Persons); see also FINRA Rules 12400(a), 13400(a).

³⁷ See FINRA Rules 12402(c), 12403(b), 13403(c).

³⁸ See FINRA Rules 12402(d)(1) (Striking and Ranking Arbitrators in Customer Cases with One Arbitrator), 12403(c)(1)(A) and (2)(A) (Striking and Ranking Arbitrators in Customer Cases with Three Arbitrators), 13404(a) and (b) (Striking and Ranking Arbitrators in Industry Disputes).

³⁹ See FINRA Rules 12402(d)(2), 12403(c)(1)(B) and (2)(B), 13404(c). Parties must deliver their ranked lists to the DRS Director no more than 20 days after the date upon which the DRS Director sent the lists to the parties. Except for certain pro se parties, parties must complete and deliver their ranked lists via the DR Party Portal (“Portal”). See FINRA Rules 12402(d)(3), 12403(c)(3), 13404(d). The Portal permits arbitration case participants to, among other things, file an arbitration claim, view case documents, submit documents to FINRA and send documents to other Portal case participants, and schedule hearing dates. See FINRA, Dispute Resolution Services: DR Portal, <https://www.finra.org/arbitration-mediation/dr-portal>.

⁴⁰ See FINRA Rules 12402(e) (Combining Lists in Customer Cases with One Arbitrators), 12402(f) (Appointment of Arbitrators in Customer Cases with One Arbitrator), 12403(d) (Combining Lists in Customer Cases with Three Arbitrators), 12403(e) (Appointment of Arbitrators in Customer Cases with Three Arbitrators), 13405 (Combining Lists in Industry Disputes), 13406 (Appointment of Arbitrators in Industry Disputes).

⁴¹ See FINRA Rule 12402(b)(1).

⁴² See FINRA Rule 12403(a)(1).

⁴³ See FINRA Rules 12402(d), 12403(c)(1), 12403(c)(2). The number of strikes available varies for each type of case. For a customer claim of \$100,000 or less, each party may exercise up to four strikes against the list. See FINRA Rule 12402(d)(1). For a customer claim of more than \$100,000, each party may exercise up to four strikes of chair-qualified arbitrators, up to six strikes of public arbitrators, and up to 10 strikes of non-public arbitrators. See FINRA Rule 12403(c).

⁴⁴ See FINRA Rules 12402(e), 12402(f), 12403(d), 12403(e)(1).

⁴⁵ See FINRA Rules 13403(a)(1), 13403(b)(1). For disputes between members, the arbitrator would generally be non-public unless the parties agree in writing otherwise. See FINRA Rule 13402(a)(1). For disputes between associated persons or between or among members and associated persons, the arbitrator would generally be public unless the parties agree in writing otherwise. See FINRA Rule 13402(b).

⁴⁶ See FINRA Rule 13403(a)(2). The panel would consist of three non-public arbitrators, one of which must be chair-qualified, unless the parties agree in writing otherwise. See FINRA Rule 13402(a)(1).

⁴⁷ See FINRA Rule 13403(b)(2). The panel would consist of two public arbitrators and one non-public arbitrator. One of the public arbitrators would serve as the chairperson unless the parties agree in writing otherwise. See FINRA Rule 13402(b).

⁴⁸ See FINRA Rule 13404. The number of strikes available varies for each type of case. For industry disputes with a single arbitrator, each party may exercise up to four strikes against the list. See FINRA Rule 13404(a). For industry disputes of more than \$100,000 between members, each party may exercise up to four strikes from the chair-qualified non-public arbitrator list and up to eight strikes from the non-public arbitrator list. See FINRA Rule 13404(b). For industry disputes of more than \$100,000 between members and/or associated persons, each party exercises as many as four strikes against each list. See FINRA Rule 13404(a).

⁴⁹ See FINRA Rules 13405, 13406.

⁵⁰ See *Leggett v. Wells Fargo Clearing Servs., LLC*, No. 2019-CV-328949, 2022 WL 1522096, at *10 (Ga. Super. Ct. Jan. 25, 2022).

⁵¹ *Id.* at *10.

⁵² *Wells Fargo Clearing Servs., LLC v. Leggett*, 876 SE2d 888, 895 (Ga. Ct. App. 2022).

⁵³ Christopher W. Gerold, Lowenstein Sandler LLP, The Report of the Independent Review of FINRA’s Dispute Resolution Services—Arbitrator Selection Process at 2, <https://www.finra.org/rules-guidance/guidance/reports/report-independent-review-finra-dispute-resolution-services-arbitrator-selection-process> (June 28, 2022) (hereinafter, the “Lowenstein Report”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 35.

⁵⁶ *Id.*

rules governing arbitration cases, as described below.⁵⁷

D. Proposed Rule Change

1. Arbitrator List-Selection Amendments

The proposed changes to the arbitrator list-selection process would address: (1) manual reviews for conflicts of interest prior to sending the ranking lists to parties; (2) the timing of conflict-of-interest and bias challenges to remove arbitrators; and (3) written explanations of the DRS Director's decision on a party-initiated challenge to an arbitrator.

a. Removal of Arbitrators for Conflicts of Interest Before Ranking Lists are Sent to the Parties

As stated above, the NLSS randomly generates a list or lists of arbitrators from which parties in each arbitration case select a panel to hear and decide the case. As part of the list-generation process, the NLSS “exclude[s] arbitrators from the lists based upon current conflicts of interest.”⁵⁸ FINRA stated that DRS then “conducts a manual review [of the list(s)] for other conflicts not identified within the list selection algorithm.”⁵⁹ The Codes do not, however, describe this manual review process.⁶⁰ The Lowenstein Report recommended that FINRA amend the Codes to require that, prior to sending the arbitrator list(s) to the parties, DRS's Neutral Management Department must conduct a manual review for conflicts of interest.⁶¹ This proposed rule change would codify existing practice by expressly requiring the DRS Director to manually review arbitrators on each list for current conflicts of interest not identified within the NLSS and authorizing the DRS Director to remove arbitrators based on the existence of such conflicts.⁶² Under this proposed rule change, “[i]f an arbitrator is removed due to such conflicts, the list selection algorithm will randomly select an arbitrator to complete the list.”⁶³

b. Removal of Arbitrators for Conflicts of Interest or Bias After Lists are Sent to the Parties but Before the First Hearing Session

Currently, the Codes permit the DRS Director to remove an arbitrator for a conflict of interest or bias, either upon request of a party or on the DRS Director's own initiative, before the first hearing session begins.⁶⁴ The Codes do not expressly specify, however, when the DRS Director may first initiate, or a party may first bring, such a challenge. FINRA stated that in practice parties may “challenge an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins[.]”⁶⁵ The proposed rule change would expressly codify this timing by authorizing the DRS Director to remove an arbitrator for a conflict of interest or bias, either upon request of a party or on the DRS Director's own initiative, “[a]fter the Director sends the list(s) generated by the list-selection algorithm to the parties,” but before the first hearing session begins.⁶⁶

c. Written Explanation of the DRS Director's Decision

Currently, the Codes do not require the DRS Director to issue a written explanation of their decision on a party-initiated challenge to remove an arbitrator.⁶⁷ The Lowenstein Report recommended that FINRA consider amending the Codes to require the issuance of a written explanation of such a decision upon the request of either party.⁶⁸ FINRA stated that its current practice is “to provide a written explanation whenever a party-initiated challenge to remove an arbitrator is granted or denied, regardless of whether an explanation is requested by either party.”⁶⁹ The proposed rule change would codify this practice by expressly requiring the DRS Director to provide the parties with a written explanation of their decision to grant or deny a party's request to remove an arbitrator.⁷⁰

2. Procedural Rules Governing Arbitration Cases

The proposed rule change would also amend certain procedural rules governing FINRA arbitration cases. The proposed rule change would address thirteen such procedural issues, and this Order discusses each in turn.

a. Virtual Prehearing Conferences

A “prehearing conference” is any hearing session “that takes place before the hearing on the merits begins.”⁷¹ Currently, the Codes indicate that prehearing conferences may generally be held by telephone.⁷² However, FINRA stated that based on forum users' experiences during the COVID-19 pandemic, DRS updated its practice to provide that all prehearing conferences would be held by video.⁷³ The proposed rule change would codify this practice by expressly requiring that prehearing conferences “will generally be held by video conference unless the parties agree to, or the panel grants a motion for, another type of hearing session.”⁷⁴

b. In-Person Hearings

A “hearing” is “the hearing on the merits of an arbitration.”⁷⁵ Currently, the Codes do not establish a default format for hearings but FINRA stated that “hearings are generally held in person,” and forum users “have not similarly expressed a preference for making video conference the default for hearings.”⁷⁶ Accordingly, other than for special proceedings (defined below),⁷⁷ the proposed rule change would provide that all hearings “will generally be held in person unless the parties agree to, or the panel grants a motion for, another type of hearing session.”⁷⁸

c. Virtual Option for Special Proceedings

As stated above, a Simplified Arbitration generally is decided by a single arbitrator based on the parties' written submissions, unless the

⁷¹ FINRA Rules 12100(y), 13100(w).

⁷² See FINRA Rules 12500(b), 12501(c), 13500(b), 13501(c).

⁷³ Notice at 2145. See FINRA, Dispute Resolution Services: Pre-Hearing Conferences, <https://www.finra.org/arbitration-mediation/prehearing-conferences>.

⁷⁴ Proposed Rules 12500(b), 12501(c), 12504(a)(5), 13500(b), 13501(c), 13504(a).

⁷⁵ FINRA Rules 12100(o), 13100(o).

⁷⁶ Notice at 2145.

⁷⁷ Under the proposed rule change, a special proceeding (defined below) would be held by video conference, unless the customer requests at least 60 days before the first scheduled hearing that it be held by telephone, or the parties agree to another type of hearing session. See proposed Rules 12800(c) and 13800(c); see also *infra* notes 79–82 and accompanying text.

⁷⁸ Proposed Rules 12600(b), 13600(b).

⁵⁷ See Notice at 2144.

⁵⁸ FINRA Rules 12402(b)(2), 12403(a)(3), 13403(a)(4), 13403(b)(4).

⁵⁹ Notice at 2144.

⁶⁰ *Id.*

⁶¹ See Lowenstein Report at 36. The Lowenstein Report recommended that FINRA amend Rule 12400. Although FINRA has elected to follow this recommendation, it did so by amending rules elsewhere in the Codes. See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

⁶² See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5); Notice at 2145.

⁶³ Proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

⁶⁴ FINRA Rules 12407(a), 13410(a). The DRS Director must first notify the parties before removing an arbitrator on the DRS Director's own initiative. The DRS Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the DRS Director's intent to remove the arbitrator. FINRA Rules 12407(a)(2), 13410(a)(2).

⁶⁵ See Notice at 2145 (indicating that FINRA wants to “ensure that the parties are aware that they may challenge an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins”).

⁶⁶ See proposed Rules 12407(a), 13410(a).

⁶⁷ Notice at 2145.

⁶⁸ Lowenstein Report at 37.

⁶⁹ Notice at 2145.

⁷⁰ See proposed Rules 12407(c), 13410(c).

customer or claimant requests a hearing.⁷⁹ If the customer or claimant requests a hearing, the Codes permit the customer or claimant to request an abbreviated telephonic hearing (*i.e.*, a “special proceeding”) on the merits.⁸⁰ FINRA stated that it received indications that customers “would prefer also to have the option to have a special proceeding by video conference.”⁸¹ The proposed rule change would require any special proceeding to be held by video conference, unless: (1) the customer requests at least 60 days before the first scheduled hearing that it be held by telephone; or (2) the parties agree to another type of hearing session.⁸²

d. Redacting Confidential Information

The Codes require a party to redact any personal confidential information (“PCI”) from documents they file with the DRS Director.⁸³ Currently, this requirement does not apply to parties in a Simplified Arbitration.⁸⁴ FINRA stated that “[d]ue to increasing concerns with customers’ identities being used for fraudulent purposes in the securities industry,” the proposed rule change would expand this redaction requirement to require a party in a Simplified Arbitration to redact any PCI from documents filed with the DRS Director.⁸⁵ In addition, FINRA stated that it would “update guidance on its website regarding the steps parties can take to protect PCI, to include guidance to pro se parties on the importance of safeguarding PCI and on how to redact PCI from documents filed with DRS.”⁸⁶

e. Number of Hearing Sessions per Day

Arbitrators are paid for each hearing session in which they participate.⁸⁷ The Codes define a “hearing session” as “any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing

conference.”⁸⁸ FINRA stated that “some arbitrators have the misunderstanding that they may be compensated for time spent outside of the hearing session, such as on lunch breaks, because the Codes do not specify when the next hearing session begins.”⁸⁹

FINRA explained that DRS’s current practice is to calculate the total number of hearing hours, subtract any time spent for lunch, and divide the remainder by four (as in four hours) to identify the number of hearing sessions.⁹⁰ FINRA stated that consistent with that practice, the proposed rule change would amend the definition of “hearing session” to indicate that, during a single day, “the next hearing session begins after four hours of hearing time has elapsed.”⁹¹

f. Update Submission Agreement When Filing a Third-Party Claim

The Codes define the term “Submission Agreement” to mean the agreement “that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.”⁹² In general, if a claim does not include a complete and properly executed Submission Agreement, the claim would be considered deficient and would not be served by the DRS Director on the other parties (*e.g.*, if a Submission Agreement fails to name all of the parties named in a claim, the claim would be considered deficient).⁹³ Thus, in practice, when a respondent includes a third-party claim⁹⁴ in their answer to a statement of claim, the respondent must serve a fully executed Submission Agreement and an answer on each other party, including the third party.⁹⁵ However, FINRA stated that because the Codes do not expressly require the respondent to file an updated Submission Agreement with any third-party claim, respondents often file deficient claims because they neglect to add the third party to the Submission Agreement.⁹⁶ The proposed rule change would address this confusion. Specifically, the proposed rule change would require a respondent filing an answer containing a third-party

claim to: (1) execute a Submission Agreement that lists the name of the third-party; and (2) file the updated Submission Agreement with the DRS Director.⁹⁷

g. Amending Pleadings or Filing Third-Party Claims

FINRA stated that the Codes do not include express procedures related to the filing of third-party claims other than those filed in an answer to a statement of claim.⁹⁸ Rather, FINRA indicated that FINRA rules relating to amended pleadings currently govern the filing of third-party claims.⁹⁹ FINRA stated that the proposed rule change would amend the Codes to expressly extend the procedures that apply to amended pleadings to the filing and serving of third-party claims.¹⁰⁰ The proposed rule change also would “restructure the provisions related to amending pleadings and filing third-party claims and add titles to clarify what processes are available based on various milestones in a case, including before and after panel appointment and before and after ranked arbitrator lists are due to the Director.”¹⁰¹

The proposed rule change would make other changes to the Codes relating to amended pleadings, including specifying that: (1) arbitrators would be “appointed to” the panel, not placed “on” the panel;¹⁰² (2) the version of an amended pleading or third-party claim that should be included with a motion need not be a hard copy;¹⁰³ (3) once the ranked arbitrator lists are due, no party would be permitted to amend a pleading to add a party or file a third-party claim until a panel has been appointed and the panel grants a motion to amend a pleading or file the third-party claim;¹⁰⁴ (4) service by first-class mail or overnight mail service would be accomplished on the date of mailing and service by any other means would be accomplished on the date of

⁷⁹ FINRA Rules 12800, 13800.

⁸⁰ FINRA Rules 12800(c)(3)(B), 13800(c)(3)(B).

⁸¹ Notice at 2146.

⁸² Proposed Rules 12800(c)(3)(B)(i), 13800(c)(3)(B)(i).

⁸³ FINRA Rules 12300(d)(1)(A), 13300(d)(1)(A). According to FINRA, PCI includes social security numbers; brokerage, bank or other financial account numbers; taxpayer identification numbers; and medical records. See FINRA, Dispute Resolution Services: Protecting Personal Confidential Information, <https://www.finra.org/arbitration-mediation/protecting-personal-confidential-information> (last visited May 11, 2023) (“PCI Guidance”).

⁸⁴ FINRA Rules 12300(d)(1)(C), 13300(d)(1)(C).

⁸⁵ Notice at 2146 and n.29 (explaining that FINRA Rules 12300(d)(1)(C) and 13300(d)(1)(C) would be deleted); proposed Rules 12300(d)(1), 13300(d)(1).

⁸⁶ See Notice at 2146; see also PCI Guidance, *supra* note 83.

⁸⁷ See Notice at 2146 (citing FINRA Rules 12214, 13214).

⁸⁸ FINRA Rules 12100(p), 13100(p).

⁸⁹ Notice at 2146.

⁹⁰ *Id.*

⁹¹ *Id.*; see proposed Rules 12100(p), 13100(p).

⁹² FINRA Rules 12100(dd), 13100(ee); see Notice at 2146 n.35.

⁹³ FINRA Rules 12307(a)(1)–(3), 13307(a)(1)–(3).

⁹⁴ A “third-party claim” is a “claim asserted against a party not already named in the statement of claim or any other previous pleading.” FINRA Rules 12100(ee), 13100(gg).

⁹⁵ See Notice at 2146; FINRA Rules 12307(a)(1)–(3), 13307(a)(1)–(3).

⁹⁶ FINRA Rules 12303(b), 13303(b); see Notice at 2146.

⁹⁷ Proposed Rules 12303(b), 13303(b).

⁹⁸ Notice at 2147; see FINRA Rules 12303(b), 13303(b).

⁹⁹ Notice at 2147; see FINRA Rules 12309, 13309. FINRA Rules 12309(a)(2) and 13309(a)(2) address the amendment of a pleading to add a party, but they do not address the filing of a third-party claim other than in an amended pleading.

¹⁰⁰ See Notice at 2147; proposed Rules 12309, 13309.

¹⁰¹ *Id.*

¹⁰² Notice at 2147; see proposed Rules 12309(a), 13309(a).

¹⁰³ Notice at 2147; see proposed Rules 12309(b)(1), 13309(b) (deleting “a copy of”).

¹⁰⁴ Notice at 2147; see proposed Rules 12309(c)(1), 13309(c)(1).

delivery;¹⁰⁵ (5) the provisions in the Codes relating to responding to amended pleadings would be separate from the current provisions relating to answering amended claims;¹⁰⁶ and (6) before panel appointment, the DRS Director would be authorized to determine whether any party may file a response to an amended pleading.¹⁰⁷

In addition, the proposed rule change would update the Customer Code's provisions governing "filing amended pleadings when a customer in an arbitration is notified by FINRA that a member or associated person in the arbitration has become inactive."¹⁰⁸ Currently, under the Customer Code, if a respondent member or associated person becomes inactive during a pending arbitration, FINRA will notify the customer of the respondent's inactive status.¹⁰⁹ Within 60 days of receiving that notice, the customer may: (1) withdraw the claim(s) against the inactive member or associated person;¹¹⁰ (2) amend a pleading (if a panel has been appointed);¹¹¹ or (3) amend a pleading to add a new party (if the notification is after the ranked arbitrator lists are due to the DRS Director).¹¹² However, the Customer Code does not expressly authorize the customer in an arbitration to file a third-party claim when they are notified by FINRA that a member or associated person in the arbitration has become inactive.¹¹³ FINRA stated that the proposed rule change would modify the Codes relating to amended pleadings to expressly authorize a customer in an arbitration to file a third-party claim when they are notified by FINRA that a member or associated person in the arbitration has become inactive after a panel is appointed, as well as after the ranked arbitrator lists are due.¹¹⁴

h. Combining Claims

Under the Codes, a party may move to join multiple claims together in the same arbitration if: (1) the claims contain common questions of law or fact; and (2)(a) the claims assert any right to relief jointly and severally, or (b) the claims arise out of the same transaction or occurrence, or series of

transactions or occurrences (*i.e.*, separate but related claims).¹¹⁵ The Codes are unclear, however, with respect to who has authority (*e.g.*, the DRS Director or a panel) to combine separate but related claims in response to such motions after a panel has been appointed to one or more cases.¹¹⁶

Before a panel has been appointed in any of the arbitration cases hearing the separate but related claims, only the DRS Director is authorized to combine such claims into one arbitration.¹¹⁷ Once a panel has been appointed in at least one of the related cases, the Codes authorize the panel to "reconsider the Director's decision upon motion of a party."¹¹⁸ The Codes do not address whether the panel has independent authority to combine such claims.¹¹⁹ Nor do the Codes specify which panel—if more than one has been appointed to hear the separate but related claims—may reconsider the DRS Director's decision to combine the claims.¹²⁰

FINRA explained the current practice typically is for the panel appointed to the "lowest-numbered case with a panel" (*i.e.*, the case with the earliest filing date) to have this authority. Where a panel has been appointed to the highest-numbered case (but not any other case) subject to the motion to combine, the panel in the highest-numbered case has the authority.¹²¹ Where a panel has been appointed to a middle-numbered case (but not any other case filed earlier) subject to a motion to combine, the panel in that middle-numbered case has the authority.¹²² The proposed rule change, as modified by Amendment No. 1, would codify this existing practice.¹²³

i. Motions in Arbitration

The Codes do not address the timing of DRS's delivery of motions, responses, and replies to the arbitrator(s) on a panel.¹²⁴ In practice, however, DRS distributes a motion, along with all the

related responses and replies to that motion, to the panel after the last reply date has elapsed, unless the panel directs otherwise.¹²⁵ The proposed rule change would codify that practice, expressly providing that the DRS Director will send all motions, responses, and replies to the panel after the last reply date expires, unless the panel directs otherwise.¹²⁶ If the DRS Director receives any submissions on the motion after the last reply date has elapsed, this proposed rule change would require the DRS Director to forward them to the panel upon receipt, and the panel would determine whether to accept them.¹²⁷

In addition, this proposed rule change would amend the Codes to add cross-references to: (1) FINRA Rules 12312 (Multiple Claimants), 12313 (Multiple Respondents), 13312 (Multiple Claimants), or 13313 (Multiple Respondents), as applicable, to indicate that motions related to separating claims or arbitrations would be decided by the DRS Director before a panel is appointed and by the panel after the panel is appointed;¹²⁸ and (2) proposed FINRA Rules 12314 (Combining Claims) and 13314 (Combining Claims), as applicable, to indicate which panel among multiple cases may combine separate but related claims into one arbitration or reconsider the DRS Director's decision to combine claims upon motion of a party.¹²⁹

Finally, the Codes require a motion to amend a pleading after panel appointment to "be accompanied by copies of the proposed amended pleading when the motion is served on the other parties and filed with the Director."¹³⁰ In practice, "accompanied by copies" has been interpreted to mean "accompanied by hard copies."¹³¹ To clarify that parties may serve on other parties and file with the DRS Director electronic copies (as well as hard copies) of a proposed amendment pleading (*i.e.*, to "clarify that hard copies are not required"), this proposed rule change would provide that a motion to amend a pleading need only "include," rather than "be accompanied

¹⁰⁵ Notice at 2147; *see* proposed Rules 12309(a)(3), 13309(a)(3).

¹⁰⁶ Notice at 2147; *see* proposed Rules 12309(d), 13309(d); FINRA Rules 12310, 13310.

¹⁰⁷ *Id.*

¹⁰⁸ Notice at 2147.

¹⁰⁹ FINRA Rule 12202(b).

¹¹⁰ *Id.*

¹¹¹ FINRA Rule 12309(b)(2).

¹¹² FINRA Rule 12309(c)(2); *see supra* note 39.

¹¹³ *See supra* notes 109–112 and accompanying text.

¹¹⁴ *See* Notice at 2147; proposed Rules 12309(b)(2), 12309(c)(2).

¹¹⁵ *See* FINRA Rules 12312, 13312.

¹¹⁶ *See* Notice at 2147.

¹¹⁷ More specifically, "the [DRS] Director may combine separate but related claims into one arbitration" before the ranked arbitrator lists are due to the DRS Director. FINRA Rules 12314, 13314; *see* Notice at 2147; *supra* note 39.

¹¹⁸ FINRA Rules 12314, 13314.

¹¹⁹ Notice at 2147.

¹²⁰ *Id.*

¹²¹ *See* Notice at 2147; Amendment No. 1 at 4.

¹²² Amendment No. 1 at 4 (expressing that this proposed rule change would "provide transparency and consistency regarding the current practice"). "Although this scenario would be rare, FINRA notes that under the proposed amendment, the default would be for the panel appointed to the lowest numbered case with a panel to preside over the combined case." *Id.*

¹²³ *Id.*; proposed Rules 12314(b), 13314(b).

¹²⁴ Notice at 2148.

¹²⁵ *Id.*

¹²⁶ Proposed Rules 12503(d), 13503(d).

¹²⁷ *Id.*

¹²⁸ Proposed Rules 12503(e)(3), 13503(e)(3); *see* Notice at 2148.

¹²⁹ Proposed Rules 12503(e)(4), 13503(e)(4). The addition of the proposed text to Rules 12503(e) and 13503(e) requires the renumbering of some paragraphs in that subsection. *See* Notice at 2148 n.63.

¹³⁰ FINRA Rules 12503(a)(4), 13503(a)(4).

¹³¹ *See* Notice at 2148 n.63.

by copies of,” the proposed amended pleading.¹³²

j. Witness Lists Shall Not Be Combined With Document Lists

Under the Codes, at least 20 days before the first scheduled hearing, all parties must: (1) provide all other parties—but not the DRS Director or arbitrators—with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced;¹³³ and (2) provide each other party—as well as the DRS Director—with the names and business affiliations of all witnesses they intend to present at the hearing.¹³⁴

Separately, FINRA stated that parties often file a single document with the DRS Director that includes a list of documents and other materials, such as exhibits, they intend to use at the hearing that have not already been produced and their witness list.¹³⁵ Because the list of documents and other materials “could contain prejudicial or inadmissible material, as a service to forum users, the DRS Director will manually remove this information from the document containing the witness list before forwarding [the witness list] to the panel.”¹³⁶ But, at times, the DRS Director “may inadvertently disseminate the list of documents and other materials to the arbitrators, which could reveal potentially prejudicial or inadmissible information to the arbitrators before the hearing.”¹³⁷

The proposed rule change protects against this risk of inadvertent disclosure by expressly providing that if parties create lists of documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced, the parties may serve the lists on all other parties, but shall not combine the lists with the witness lists filed with the DRS Director pursuant to Rule 12514(b) or 13514(b), as applicable.¹³⁸

¹³² Proposed Rules 12503(a)(4), 13503(a)(4); see Notice at 2148 n.63 (erroneously citing proposed Rules 12504(a)(4) and 13504(a)(4) when describing this proposed rule change); FINRA April Letter at 1 n.1 (correcting the error).

¹³³ See FINRA Rules 12514(a), 13514(a) (“The parties should not file the documents with the [DRS] Director or the arbitrators before the hearing.”).

¹³⁴ FINRA Rules 12514(b), 13514(b).

¹³⁵ Notice at 2148.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Proposed Rule 12514(a), 13514(a); see Notice at 2148.

k. Hearing Records

The official record of an arbitration hearing is the DRS Director’s tape, digital, or other recording of every arbitration hearing; however, if a party chooses to make a stenographic record of a hearing, a panel may decide in advance of a hearing that a party’s stenographic record will be the official record of the hearing.¹³⁹ If the DRS Director’s recording is the official record, the panel “may order the parties to provide a transcription of the recording” and “copies of the transcription must be provided to each arbitrator, served on each party, and filed with the Director.”¹⁴⁰ If a party’s stenographic record is the official record, “a copy must be provided to each arbitrator, served on each other party, and filed with the Director.”¹⁴¹ Further, “[t]he cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.”¹⁴² But the Codes do not specify which party must provide to each arbitrator, serve on each other party, and file with the DRS Director a copy of a transcription of the official record.¹⁴³ The proposed rule change would assign that responsibility to the party or parties: (1) ordered to provide a transcription; or (2) electing to make a stenographic record.¹⁴⁴

In addition, FINRA indicated that “executive sessions” are not recorded because they are not part of the official record of the hearing.¹⁴⁵ Rather, they are “discussions among arbitrators” outside the presence of the parties, the parties’ representatives, witnesses, and stenographers.¹⁴⁶ FINRA stated that to promote “transparency and consistency,” this proposed rule change would expressly provide that executive sessions would not be recorded.¹⁴⁷

l. Dismissal of Proceedings for Insufficient Service

The Codes require parties, other than those proceeding *pro se*, to serve all pleadings and other documents through the Portal.¹⁴⁸ Service is accomplished on the date of submission in the

Portal.¹⁴⁹ If a party who is served fails to submit an answer, DRS reviews the service history with the panel and asks the panel to decide whether service was complete and sufficient before the case may proceed to hearing.¹⁵⁰ Although the Codes do not address what action the panel should take if it determines that service was insufficient,¹⁵¹ current practice permits a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service.¹⁵² The proposed rule change would codify this practice, expressly permitting a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service upon a respondent.¹⁵³

The proposed rule change would also make non-substantive changes to the Codes. FINRA Rules 12700 (Dismissal of Proceedings Prior to Award) and 13700 (Dismissal of Proceedings Prior to Award) currently include cross-references to specific rules in which a panel may dismiss a claim or an arbitration, including dismissals of time-barred claims,¹⁵⁴ dismissals as a “sanction for material and intentional failure to comply with an order of the panel,”¹⁵⁵ and dismissals due to multiple postponements.¹⁵⁶ The rules do not, however, include cross-references to FINRA rules generally governing motions to dismiss (*i.e.*, FINRA Rules 12504 and 13504). The proposed rule change would amend Rules 12700(b) and 13700(b) to add a cross-reference to Rule 12504 or 13504, as applicable.¹⁵⁷

m. Dismissal of Claims Requires Issuance of an Award

An “award” is a document stating the final disposition of an arbitration at its conclusion.¹⁵⁸ It may include, among other things, a “summary of the issues . . . in controversy,” the damages or relief requested, the damages or relief the panel has awarded, and the panel’s reasoning.¹⁵⁹ The Codes require FINRA to publish awards, which it does on its

¹⁴⁹ *Id.*

¹⁵⁰ Notice at 2148.

¹⁵¹ *Id.* at 2148–49.

¹⁵² *Id.* at 2149.

¹⁵³ Proposed Rules 12700(c), 13700(c).

¹⁵⁴ FINRA Rule 12700(b) (citing Rule 12206); FINRA Rule 13700(b) (citing Rule 13306).

¹⁵⁵ FINRA Rule 12700(b) (citing Rule 12212(c)); FINRA Rule 13700(b) (citing Rule 13212(c)).

¹⁵⁶ FINRA Rule 12700(b) (citing Rule 12601(c)); FINRA Rule 13700(b) (citing Rule 13601(c)).

¹⁵⁷ Proposed Rules 12700(b)(1), 13700(b)(1). The proposed rule change also would replace the bulleted list with a numbered list. Proposed Rules 12700(b), 13700(b).

¹⁵⁸ FINRA Rules 12100(c), 13100(c), 12904(b), 13904(b).

¹⁵⁹ See FINRA Rules 12904, 13904.

¹³⁹ FINRA Rules 12606, 13606.

¹⁴⁰ FINRA Rules 12606(a)(2), 13606(a)(2).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Notice at 2148.

¹⁴⁴ Proposed Rules 12606(a)(2), 13606(a)(2), 12606(b)(2), 13606(b)(2).

¹⁴⁵ Notice at 2148.

¹⁴⁶ *Id.*

¹⁴⁷ Proposed Rules 12606(a)(1), 13606(a)(1).

¹⁴⁸ FINRA Rules 12300, 13300; see *supra* note 39.

website.¹⁶⁰ Although the Codes permit a panel to grant a motion to dismiss a party's entire case after the conclusion of that party's case-in-chief,¹⁶¹ the Codes do not address whether such a dismissal requires the issuance of an award.¹⁶² FINRA stated that current practice is "to require the issuance of an award" in this situation because "the dismissal of all a claimant's claims disposes of the case."¹⁶³ The proposed rule change would codify this practice by requiring any panel that grants a motion to dismiss all claims to issue a "decision" containing the elements of a written award and make the decision "publicly available as an award."¹⁶⁴

III. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letters, and FINRA's response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.¹⁶⁵ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.¹⁶⁶ In particular, as set forth below, the Commission finds that the proposed rule change is reasonably designed to protect investors and the public interest. It promotes transparency about FINRA's arbitration process and helps ensure consistent requirements across arbitration cases. The Commission addresses each aspect of the proposed rule change, and any related comments, in turn.

¹⁶⁰ See FINRA Rules 12904(h) and 13904(h); see also FINRA, Arbitration Awards Online, <https://www.finra.org/arbitration-mediation/arbitration-awards>.

¹⁶¹ See FINRA Rules 12504(b), 13504(b).

¹⁶² Notice at 2149.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; see proposed Rule 12504(b), 13504(b); FINRA Rules 12904(e), 13904(e) (describing elements of an award).

¹⁶⁵ In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁶⁶ 15 U.S.C. 78o-3(b)(6).

A. Arbitrator List-Selection Amendments

1. Removal of Arbitrators for Conflicts of Interest Before Ranking Lists Are Sent to the Parties

As stated above, the proposed rule change would codify existing practice by expressly requiring the DRS Director to manually review arbitrators on each arbitrator ranking list for current conflicts of interest not identified within the NLSS selection process and authorizing the DRS Director to remove arbitrators based on the existence of such conflicts before sending the arbitrator ranking lists to the parties.¹⁶⁷ Under this proposed rule change, "[i]f an arbitrator is removed due to such conflicts, the list selection algorithm will randomly select an arbitrator to complete the list."¹⁶⁸ FINRA stated that this proposed rule change responds to the Lowenstein Report's recommendation that the Codes require DRS's Neutral Management Department to conduct a manual review for conflicts of interest prior to sending the arbitrator list to the parties.¹⁶⁹ FINRA believes that this proposed rule change would enhance the transparency of the arbitrator-selection process by codifying DRS's practice of conducting a manual review for conflicts of interest that the NLSS may have missed prior to sending an arbitrator ranking list to the parties.¹⁷⁰

Four commenters supported this proposed rule change.¹⁷¹ One commenter emphasized that this

¹⁶⁷ See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5); Notice at 2145.

¹⁶⁸ Proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5). The DRS Director will send the lists generated by the NLSS to all parties at the same time, within approximately 30 days after the last answer is due, regardless of the parties' agreement to extend any answer due date. See FINRA Rules 12402(c), 12403(b), 13403(c).

¹⁶⁹ See Notice at 2144; Lowenstein Report at 36.

¹⁷⁰ See Notice at 2144-45, 2149.

¹⁷¹ Letter from Hugh Berkson, President, Public Investors Advocate Bar Association ("PIABA"), to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 1, 2023) ("PIABA Letter") at 2; letter from Elissa Germaine, Supervising Attorney, Fairbridge Investor Rights Clinic, Pace University School of Law, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 2, 2023) ("Pace Letter") at 1; letter from Christine Lazaro, Professor of Clinical Legal Education & Director of the Securities Arbitration Clinic, St. John's University School of Law, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 2, 2023) ("St. John's Letter") at 1; and letter from William Jacobson, Clinical Professor & Director, Cornell Law School's Securities Law Clinic, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 2, 2023) ("Cornell Letter") at 1-2 (Cornell's pagination is mistaken; throughout this Order, the Commission refers to the actual page number as it appears in the sequence of the PDF document).

proposed rule change would provide "much greater transparency to internal FINRA processes."¹⁷² A second commenter indicated that it would boost confidence in the arbitrator list-selection process.¹⁷³ A third commenter stated that it would promote efficiency and fairness in the arbitration process by "prevent[ing] scenarios where the parties would have to initiate a challenge to remove arbitrators due to blatant conflicts of interest once a panel has been appointed."¹⁷⁴

A fifth commenter offered no objection to this proposed rule change provided that the DRS Director's authority would be limited to "conflicts of interest of the type screened out by the [NLSS]," and the DRS Director would not have "unlimited discretion to strike arbitrators for potential or suspected conflicts of interest or bias."¹⁷⁵ The commenter acknowledged that FINRA publishes some general guidance on conflicts of interest¹⁷⁶ but suggested that "the Codes define 'conflicts of interest' to clarify to the parties what relationships will cause an arbitrator to be struck by NLSS or manually by the Director."¹⁷⁷

In response, FINRA stated that the "non-exhaustive list of potential conflicts . . . published on [its] website

¹⁷² PIABA Letter at 2.

¹⁷³ St. John's Letter at 1 ("Codifying this process will help parties feel confident in the selection process."). St. John's couples its support with a recommendation that FINRA "upgrad[e] the archaic algorithm by which the conflicts are screened," thus "limit[ing] the necessity for manual review." St. John's Letter at 1. This comment is outside the scope of this proposed rule change, as FINRA has not proposed any changes to the NLSS itself. FINRA indicated, however, that it is in the process of assessing whether the NLSS remains "the most effective means in creating random, computer-generated arbitrator lists for the arbitrator participants." FINRA April Letter at 4.

¹⁷⁴ Cornell Letter at 2.

¹⁷⁵ Letter from Aleah Jones, Pickard Djinis and Pissari LLP, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (May 9, 2023) ("Pickard Letter") at 3.

¹⁷⁶ *Id.* at 3 n.8 (citing FINRA, How Parties Select Arbitrators, <https://www.finra.org/arbitration-mediation/arbitrator-selection>). In the Notice, FINRA cited the same web page and identified the following potential conflicts of interest: "the arbitrator is employed by a party to the case; the arbitrator is an immediate family member or relative of a party to the case or a party's counsel; the arbitrator is employed at the same firm as a party to the case; the arbitrator is employed at the same law firm as counsel to a party to the case; the arbitrator is representing a party to the case as counsel; the arbitrator is an account holder with a party to the case; the arbitrator is employed by a member firm that clears through a clearing agent that is a party to the case; or the arbitrator is in litigation with or against a party to the case. DRS may also remove an arbitrator for other reasons affecting the arbitrator's ability to serve, such as if DRS learns the arbitrator has moved out of the hearing location." Notice at 2145 n.11.

¹⁷⁷ Pickard Letter at 3.

sufficiently explains to forum users what types of relationships or connections FINRA looks for to determine whether a conflict of interest exists.”¹⁷⁸

The Commission believes that expressly requiring the DRS Director to manually review arbitrators on each arbitrator ranking list for current conflicts of interest not identified within the NLSS and authorizing the DRS Director to remove arbitrators based on the existence of such conflicts should improve fairness in the arbitration process. Specifically, the proposed rule change should help ensure that each arbitrator ranking list is composed of arbitrators that are free of conflicts of interest with the parties to the arbitration. The Commission further notes that the proposed rule change does not expand the DRS Director’s discretion to remove arbitrators from the ranking lists due to a conflict of interest. Instead, the DRS Director’s review of ranking lists will continue to be limited to current conflicts of interest not identified within the NLSS selection process and consistent with those described by FINRA on its website. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

2. Removal of Arbitrators for Conflicts of Interest or Bias After Lists Are Sent to the Parties but Before the First Hearing Session

In addition to authorizing the DRS Director to remove an arbitrator for a conflict of interest before the NLSS-generated ranking lists are sent to the parties,¹⁷⁹ the proposed rule change would expressly authorize the DRS Director to remove an arbitrator for a conflict of interest or bias on the DRS Director’s own initiative or upon a party’s request “[a]fter the Director sends the lists generated by the list selection algorithm to the parties, but before the first hearing session begins.”¹⁸⁰ FINRA explained that this change would “ensure that the parties are aware that they may challenge an arbitrator for cause at any point after receipt of the arbitrator ranking lists until the first hearing session begins.”¹⁸¹

Four commenters supported this proposed rule change.¹⁸² One of these

four commenters reasoned that it “would assist parties unfamiliar with the arbitration process by helping them understand their rights and abilities as it relates to challenges to remove arbitrators.”¹⁸³ A fifth commenter objected to the proposed rule change, expressing concern that parties could “exert greater control over the arbitral selection process than they had under the previous rule set” and assert a “conflict of interest or bias” as a form of gamesmanship.¹⁸⁴ This commenter urged FINRA to “restore the arbitration ranking system previously in place.”¹⁸⁵

In response, FINRA stated that the proposed rule change would not amend the process related to the removal of arbitrators on the DRS Director’s own initiative or upon a party’s request.¹⁸⁶ Rather, the proposed rule changes would clarify the timing for the process (*i.e.*, after the DRS Director sends the lists generated by the NLSS to the parties, but before the first hearing session begins).¹⁸⁷ Accordingly, to challenge an arbitrator, the Codes would continue to require a party to file a written motion with DRS and serve the motion on each party so that the motions are available to all parties.¹⁸⁸ Thus, if a party challenges an arbitrator, all other parties are provided an opportunity to make their arguments prior to any decision by the DRS Director.¹⁸⁹

The Commission believes the fifth commenter’s objection reflects a mistaken reading of this proposed rule change. The Codes currently permit the DRS Director to remove an arbitrator for a conflict of interest or bias, either upon request of a party or on the DRS Director’s own initiative at any point after parties’ receipt of the arbitrator ranking lists until the first hearing session begins.¹⁹⁰ The proposed rule change does not alter the DRS Director’s or parties’ ability to challenge an arbitrator for cause but rather would make the process more transparent by making explicit in the rule text that such challenge may take place at any point after receipt of the arbitrator ranking lists until the first hearing session begins. The Commission believes that the proposed rule change is reasonably designed to help ensure

that all parties are equally informed of their ability to challenge arbitrators for cause. For these reasons, the Commission finds that it is reasonably designed to protect investors and in the public interest.

3. Written Explanation of DRS Director’s Decision

As stated above, the proposed rule change would codify existing practice by expressly requiring the DRS Director to provide the parties to an arbitration with a written explanation of their decision “to grant or deny a party’s request to remove an arbitrator”¹⁹¹ FINRA stated that it codified this current practice in response to a recommendation in the Lowenstein Report.¹⁹²

Four commenters supported this proposed rule change, explaining that written explanations would improve transparency, consistency, and fairness in the arbitrator-removal process.¹⁹³ One commenter also emphasized that written explanations would promote “confidence in the integrity of the arbitration selection process.”¹⁹⁴ Two commenters indicated that written explanations would help parties to understand the DRS Director’s decisions.¹⁹⁵ But another commenter coupled its support for this proposed change with a recommendation for improvement: the written explanations should be published in a “publicly available database, such as the one currently maintained for FINRA awards.”¹⁹⁶ According to this commenter, publishing such information—even in redacted form—would illuminate the nature and scope of the factors that FINRA considers to be “legitimate ground[s] for a challenge to a potential arbitrator.”¹⁹⁷ A fifth commenter offered no objection to this proposed rule change provided, as stated above, that the DRS Director would not have unlimited authority to strike potential arbitrators.¹⁹⁸

In response, FINRA acknowledged the commenter’s recommendation to publish the DRS Director’s written explanation in a publicly available database in order to enhance “transparency regarding the arbitrator

¹⁹¹ See proposed Rules 12407(c), 13410(c); Notice at 2145.

¹⁹² See Notice at 2145; Lowenstein Report at 37.

¹⁹³ See PIABA Letter at 2; Cornell Letter at 2; Pace Letter at 2; St. John’s Letter at 2.

¹⁹⁴ See Pace Letter at 2 (supporting the proposed rule change and noting the importance of “confidence in the integrity” of the system).

¹⁹⁵ *Id.* at 2; Cornell Letter at 2.

¹⁹⁶ See PIABA Letter at 2.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ See Pickard Letter at 3.

its support for the written-decision proposed rule change); Cornell Letter at 2; St. John’s Letter at 2.

¹⁸³ See St. John’s Letter at 2.

¹⁸⁴ See Pickard Letter at 3–4.

¹⁸⁵ *Id.* at 4.

¹⁸⁶ See FINRA August Letter at 3–4.

¹⁸⁷ See proposed Rules 12407(a), 13410(a).

¹⁸⁸ See *id.* at 4; see also FINRA Rules 12503 (Motions) and 13503 (Motions).

¹⁸⁹ See FINRA August Letter at 4.

¹⁹⁰ See FINRA Rules 12407(a) and 13410(a).

¹⁷⁸ See FINRA August Letter at 4.

¹⁷⁹ See proposed Rules 12402(b)(3), 12403(a)(4), 13403(a)(5), 13403(b)(5).

¹⁸⁰ See proposed Rules 12407(a), 13410(a).

¹⁸¹ See Notice at 2145.

¹⁸² See PIABA Letter at 2; Pace Letter at 1 (noting its “support [for] FINRA’s proposed list selection process amendments,” though it only emphasizes

list selection process.”¹⁹⁹ However, FINRA declined to make public the DRS Director’s written explanations to grant or deny a party’s request to remove an arbitrator.²⁰⁰ FINRA explained that these decisions have “little precedential value”—and their publication therefore offers limited public value—because each decision is based on the facts and circumstances of a single case.²⁰¹ But to address the commenter’s recommendation to enhance transparency, FINRA stated that it would publish “the most common reasons for granting or denying party-initiated challenges” on its website.²⁰² FINRA believes that the publication of this information on its website would make the arbitrator-challenge process more transparent by providing parties with “useful information when considering potential challenges to remove an arbitrator.”²⁰³

The Commission believes that expressly requiring the DRS Director to provide the parties to an arbitration with a written explanation of the DRS Director’s decision to grant or deny a party’s request to remove an arbitrator improves the perception of fairness in the arbitration forum by enhancing transparency into the removal process. Because the proposed rule change would not expand the DRS Director’s discretion to remove a conflicted or biased arbitrator, the DRS Director’s authority to remove such arbitrator would remain limited. In addition, with respect to public access to decisions on motions to remove arbitrators, the Commission believes that FINRA’s approach of publishing the most common reasons for granting or denying such requests on its website would provide participants considering whether to file a motion to remove an arbitrator for conflicts or bias with a valuable source of information regarding such challenges. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

B. Procedural Amendments

1. Virtual Prehearing Conferences

As stated above, the Codes currently indicate that prehearing conferences will generally be held by telephone.²⁰⁴ The proposed rule change would provide that prehearing conferences “will generally be held by video conference unless the parties agree to, or

the panel grants a motion for, another type of hearing session.”²⁰⁵ FINRA stated that parties “have expressed a preference for holding prehearing conferences by video conference[.]”²⁰⁶ explaining that some parties “may perceive an increase in their ability to participate or interact in the hearings by video.”²⁰⁷

Three commenters supported this proposed rule change, and a fourth did not address this specific issue.²⁰⁸ One commenter emphasized that video conferences would “enhance[.] communication between the parties, counsel, and arbitrators [by providing] the ability to read body language and facial expressions.”²⁰⁹ Motivated by a concern that video conferencing could impose an “undue burden on claimants,” one commenter recommended that this proposed rule change require a panel to consider the parties’ access to and comfort with technology when evaluating motions for hearings in formats other than video.²¹⁰ A fifth commenter offered general support for this proposed rule change but recommended that this proposed rule change permit “another type of hearing session . . . if agreed to by a majority of the parties.”²¹¹ This commenter explained that “the majority should prevail without the matter needing to be put to a motion and considered at a prehearing session” where there are more than two parties to an arbitration.²¹²

In response, FINRA stated that the COVID-19 pandemic required the development of “policies and procedures around conducting arbitration cases using virtual hearings and [therefore FINRA] created resource guides for parties and arbitrators for such hearings.”²¹³ Approximately three years later, “parties have become proficient with using this technology and have embraced it as an alternative to other hearing methods.”²¹⁴ The proposed rule change would reflect this preference. FINRA also stated that it would update, as appropriate, the guidance it makes available to participants to help ensure that all

participants have the information they need to “participate fully in virtual prehearing conferences.”²¹⁵ If a party nonetheless prefers to have an in-person prehearing conference, FINRA stated that it could file a motion seeking that relief, and the panel can consider, among other things, “a party’s access to and comfort level with technology.”²¹⁶

In addition, FINRA stated that it believes a panel, once fully briefed, is in the best position to determine whether an alternative prehearing format is more suitable to the parties than the proposed default format of video conference. Therefore, FINRA declined to amend the proposed rule change to allow a majority of the parties to agree to another type of hearing.²¹⁷

The Commission believes that requiring prehearing conferences to be held by video conference provides parties the opportunity to see and interact with the other participants in the case, enhancing their participation. But because this proposed rule change also permits a motion by a party for another hearing format, every party has a fair opportunity to request an alternative format based upon, among other things, access to or comfort with technology. Furthermore, the Commission believes FINRA reasonably determined that the arbitrator panel is in the best positioned to evaluate and determine whether another prehearing format is appropriate in situations where there is not agreement among the parties to another type of hearing. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

2. In-Person Hearings

The proposed rule change would also amend the provision governing the format for hearings on the merits of a case. Currently, the Codes do not articulate a definitive format for hearings.²¹⁸ FINRA stated, however, that “hearings are generally held in person,” and forum users “have not similarly expressed a preference for making video conference the default for hearings.”²¹⁹ The proposed rule change would codify existing practice,

¹⁹⁹ See FINRA April Letter at 4.

²⁰⁰ See *id.* at 4–5.

²⁰¹ *Id.* at 4.

²⁰² See *id.* at 4–5.

²⁰³ *Id.* at 5.

²⁰⁴ See *supra* note 77.

²⁰⁵ See proposed Rules 12500(b), 12501(c), 12504(a)(5), 13500(b), 13501(c), 13504(a).

²⁰⁶ See Notice at 2145.

²⁰⁷ See Notice at 2150.

²⁰⁸ See Cornell Letter at 2; Pace Letter at 2; St. John’s Letter at 2; see PIABA Letter at 2–3 (noting general support for all procedural amendments, but not addressing this one specifically).

²⁰⁹ See Pace Letter at 2.

²¹⁰ See Cornell Letter at 2.

²¹¹ See Pickard Letter at 4 (emphasis removed).

²¹² *Id.* at 4.

²¹³ See FINRA April Letter at 11.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See *id.* (stating that “[i]n addition, FINRA notes that once fully briefed, a panel will decide a motion regarding the hearing format based on all the information provided, which could include a party’s access to and comfort level with technology.”).

²¹⁷ See FINRA August Letter at 5.

²¹⁸ See FINRA Rules 12600(b) and 13600(b) (stating that the panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner).

²¹⁹ See Notice at 2145.

providing that all hearings “will generally be held in person unless the parties agree to, or the panel grants a motion for, another type of hearing session.”²²⁰ No commenter offered specific support or opposition to this proposed change.

In light of FINRA’s experience with forum users, the Commission believes FINRA’s determination to require that hearings on the merits generally be held in person is reasonable. It will clarify the default format of the hearing, which should enhance transparency and efficiency, and eliminate potential misunderstandings among parties. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

3. Virtual Option for Special Proceedings

As stated above, the proposed rule change would require parties to hold special proceedings in Simplified Arbitrations by video conference, unless: (1) the claimant requests at least 60 days before the first scheduled hearing that it be held by telephone; or (2) the parties agree to another type of hearing session.²²¹ This proposed rule change follows FINRA’s receipt of “suggestions from customers that they would prefer . . . to have the option to have a special proceeding by video conference.”²²²

Four commenters supported this proposed rule change, and a fifth offered no objection.²²³ One commenter emphasized that it would “facilitate more accurate communication compared to telephone conferences” by permitting participants to view facial expressions and reactions.²²⁴ Another commenter indicated that video conferences would permit “investors with small claims to present their case to the arbitrator without added expenses or travel.”²²⁵

The Commission believes that requiring parties to hold special proceedings in Simplified Arbitrations by video conference (with limited exceptions) should improve the format and delivery of claimants’ cases to arbitrators in Simplified Arbitration. In addition, given the proliferation of video-conferencing technology to the

public, this proposed rule change should not impose logistical or financial burdens on parties. At the same time, however, the proposed rule change makes clear the flexibility to alter the format of these hearings as necessary where a claimant requests or the parties agree. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

4. Redacting Confidential Information

As stated above, the proposed rule change would require any party in a Simplified Arbitration to redact any PCI from documents filed with the DRS Director.²²⁶ FINRA stated that this change would address “increasing concerns with customers’ identities being used for fraudulent purposes in the securities industry.”²²⁷ It would also align the redaction requirements for Simplified Arbitrations with those of other arbitration cases.²²⁸ FINRA acknowledged that it previously declined to extend this requirement to Simplified Arbitrations due to a concern that pro se litigants would have difficulty complying.²²⁹ To address this concern, FINRA stated that it would update guidance on its website regarding how to redact PCI from documents filed with DRS.²³⁰

Four commenters broadly supported FINRA’s effort to protect investors’ PCI in Simplified Arbitrations, and a fifth offered no objection.²³¹ But the four supportive commenters each expressed concern that this proposed rule change would disproportionately impact pro se claimants who may lack the technological experience to effectively and efficiently redact PCI.²³² Notwithstanding that concern, one commenter concluded that “the benefits to privacy outweigh the increased complexity, assuming that the guidance provided by FINRA adequately assists pro se parties in making redactions.”²³³

The other three supportive commenters recommended changes to the rule or its implementation to help mitigate their concern over pro se

parties.²³⁴ Two of these commenters suggested that FINRA post redaction guidance both on its website and the Portal.²³⁵ One commenter emphasized the importance of FINRA providing clear, comprehensive, and plain-English guidance for the benefit of pro se claimants, as well as “examples of what a properly redacted document looks like, and basic suggestions about how to make the redactions.”²³⁶ For cases in which claimants are unable to redact PCI notwithstanding the guidance, another commenter recommended that FINRA either apply the required redactions itself or permit investors to waive the redaction of their own PCI.²³⁷ The commenter explained that this alternative approach would prevent “dismissals either due to pro se filers’ inability to comply with the rule, or their abandoning their case because they don’t fully understand how to accomplish the redaction.”²³⁸

In response, FINRA stated that it would provide clear, plain English guidance on the steps pro se parties can take to protect PCI and on how to redact PCI from documents filed with DRS on both its website and the Portal.²³⁹ But FINRA declined to permit pro se investors to waive the redaction of their own PCI because it would undermine this proposed rule change’s effort to “safeguard investors’ information and their financial resources.”²⁴⁰ FINRA also declined to make the redactions itself, explaining that FINRA rules require the application of redactions before a document is ever filed with FINRA.²⁴¹ In sum, “FINRA believes the benefits of safeguarding customers’ identities and sensitive information balance the concerns relating to pro se

²³⁴ See PIABA Letter at 3; Pace Letter at 2–3; St. John’s Letter at 2.

²³⁵ See PIABA Letter at 3 (stating that FINRA should post the guidance on the “case’s docket/portal”); Pace Letter at 3 (stating that FINRA should post the guidance on the Portal in a “visible and accessible manner, at the point in time when customers are likely to be uploading documents that may contain PCI” to help “ensure that guidance on PCI redaction is sufficiently beginner- and user-friendly and is not overlooked by pro se parties”).

²³⁶ See Pace Letter at 3.

²³⁷ See St. John’s Letter at 2.

²³⁸ *Id.*

²³⁹ See FINRA April Letter at 5–6.

²⁴⁰ *Id.* at 6 (noting that waiver “would defeat the purpose of the Proposal”).

²⁴¹ *Id.*; see also FINRA Rules 12300(d)(1)(A) and 13300(d)(1)(A) (stating that “if the Director receives a claim . . . with the full Social Security number, taxpayer identification number or financial account number, the Director will deem the filing deficient under Rule 12307 and will request that the party refile the document in compliance with this paragraph.”); see also FINRA April Letter at 6 n.20 (emphasizing that FINRA would treat any filed claim or document as deficient or improper if it contained certain PCI).

²²⁰ See proposed Rules 12600(b), 13600(b); but see *supra* note 77.

²²¹ See proposed Rules 12800(c)(3)(B)(i), 13800(c)(3)(B)(i).

²²² See Notice at 2146.

²²³ PIABA Letter at 3; Cornell Letter at 2–3; Pace Letter at 2; St. John’s Letter at 2; Pickard Letter at 4.

²²⁴ Cornell Letter at 3; see Pace Letter at 2.

²²⁵ St. John’s Letter at 2.

²²⁶ See Notice at 2146 and n.29 (explaining that FINRA Rules 12300(d)(1)(C) and 13300(d)(1)(C) would be deleted); proposed Rules 12300(d)(1), 13300(d)(1).

²²⁷ See Notice at 2146.

²²⁸ See FINRA Rules 12300(d)(1)(A), 13300(d)(1)(A).

²²⁹ See Notice at 2146.

²³⁰ *Id.*; see PCI Guidance, *supra* note 83.

²³¹ See PIABA Letter at 3; Cornell Letter at 3; Pace Letter at 2; St. John’s Letter at 2; Pickard Letter at 5.

²³² See PIABA Letter at 3; Cornell Letter at 3; Pace Letter at 2–3; St. John’s Letter at 2.

²³³ See Cornell Letter at 3.

parties' lack of experience with filing claims in the forum.”²⁴²

The Commission believes that requiring customers to redact PCI from any document they submit to DRS should help prevent substantial harm to investors. Absent this proposed rule change, unredacted PCI filed in Simplified Arbitrations could be misused by third parties. The Commission acknowledges commenters' concern that pro se investors might struggle to comply with the new redaction requirements and believes FINRA's plan to publish plain-English guidance should aid pro se investors in complying with these obligations without diminishing FINRA's efforts to protect PCI. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

5. Number of Hearing Sessions per Day

As stated above, arbitrators receive compensation for each hearing session in which they participate.²⁴³ To calculate the number of hearing sessions per day, FINRA explained that DRS's current practice is to calculate the total number of hearing hours, subtract any time spent for lunch, and divide the remainder by four (as in four hours).²⁴⁴ Consistent with this methodology, this proposed rule change would amend the definition of “hearing session” to indicate that, during a single day, “the next hearing session begins after four hours of hearing time has elapsed.”²⁴⁵

One commenter supported this proposed rule change.²⁴⁶ Another commenter offered no objection to this proposed rule change so long as it “would not cause the party to whom fees are assessed . . . to pay for ‘session time’ not actually spent in session.”²⁴⁷ More broadly, this commenter requested “greater clarity . . . as it is unclear . . . whether fees for two full sessions will be assessed after four hours and one minute of hearing time have elapsed.”²⁴⁸

In response, FINRA stated that after four hours and one minute of hearing time have elapsed, it would pay arbitrators for two hearing sessions to ensure that they are compensated for their time and service to the DRS forum.²⁴⁹ FINRA further stated that it would update its arbitrator guidance to

encourage arbitrators to be efficient in managing the time during hearings to minimize, whenever possible, the number of hearing sessions held.²⁵⁰

The Commission believes that aligning the Codes' definition of “hearing session” with FINRA's current practice for calculating the number of hearing sessions in a single day promotes transparency and clarity in the way DRS calculates the number of hearing sessions. As such, the proposed rule change should help parties to an arbitration better understand the fees charged in a proceeding and better plan the presentation of their claim. For these reasons the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

6. Update Submission Agreement When Filing a Third-Party Claim

As stated above, the proposed rule change would expressly require a respondent filing an answer with a third-party claim to (1) execute a Submission Agreement that lists the name of the third-party and (2) file the updated Submission Agreement with the DRS Director.²⁵¹ FINRA stated that failing to file an updated Submission Agreement makes a third-party claim deficient under existing rules, and that the prevalence of this mistake currently causes time-consuming delays in arbitration.²⁵² The proposed rule change would help “avoid potential delay and slower case processing times” by emphasizing the parties' obligations under the rules.²⁵³

One commenter offered no objection to this proposed rule change.²⁵⁴ Another commenter supported this proposed rule change, explaining that it has “no drawbacks” because it would “add clarification and prevent delays.”²⁵⁵

The Commission believes that by addressing the apparent confusion that results in filing of deficient claims, this proposed rule change helps ensure more consistent compliance with forum rules and prevent unnecessary delays in case processing. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

7. Amending Pleadings or Filing Third-Party Claims

As stated above, the proposed rule change would modify several procedures related to the filing of amended pleadings and third-party claims. First, the proposed rule change would expand the application of FINRA Rules 12309 and 13309 (Amending Pleadings) from just amended pleadings to both amended pleadings and third-party claims.²⁵⁶ FINRA stated that these proposed rule changes would help address the current absence of express provisions governing the filing of third-party claims other than in a respondent's answer to a claim.²⁵⁷ Second, the proposed rule change would make other changes to the Codes relating to amended pleadings, including specifying that: arbitrators are “appointed to” the panel, not placed “on” the panel;²⁵⁸ an amended pleading or third-party claim that is included with a motion need not be a hard copy;²⁵⁹ once the ranked arbitrator lists are due, no party may amend a pleading to add a party or file a third-party claim until a panel has been appointed and the panel grants a motion to amend a pleading or file the third-party claim;²⁶⁰ service by first-class mail or overnight mail service is accomplished on the date of mailing; service by any other means is accomplished on the date of delivery;²⁶¹ the provisions in the Codes relating to responding to amended pleadings are separate from the current provisions relating to answering amended claims;²⁶² and before panel appointment, the DRS Director would be authorized to determine whether any party may file a response to an amended pleading.²⁶³ Third, the proposed rule change would expressly permit a customer to file a third-party claim if a respondent becomes an inactive FINRA member or associated person.²⁶⁴

²⁵⁶ See Notice at 2147; *see generally* proposed Rules 12309, 13309.

²⁵⁷ Notice at 2147; *see* FINRA Rules 12303(b), 13303(b).

²⁵⁸ Notice at 2147; *see* proposed Rules 12309(a), 13309(a).

²⁵⁹ Notice at 2147; *see* proposed Rules 12309(b)(1), 13309(b) (deleting “a copy of”).

²⁶⁰ Notice at 2147; *see* proposed Rules 12309(c)(1), 13309(c)(1).

²⁶¹ Notice at 2147; *see* proposed Rules 12309(a)(3), 13309(a)(3).

²⁶² Notice at 2147; *see* proposed Rules 12309(d), 13309(d); FINRA Rules 12310, 13310.

²⁶³ Notice at 2147; *see* proposed Rules 12309(d), 13309(d); FINRA Rules 12310, 13310.

²⁶⁴ Proposed Rules 12309(b)(2), 12309(c)(2).

²⁴² See FINRA April Letter at 7.

²⁴³ See Notice at 2146 (citing FINRA Rules 12214, 13214).

²⁴⁴ *Id.*

²⁴⁵ *Id.*; *see* proposed Rules 12100(p), 13100(p).

²⁴⁶ See Cornell Letter at 3.

²⁴⁷ See Pickard Letter at 5.

²⁴⁸ *Id.* at 5.

²⁴⁹ See FINRA August Letter at 5.

²⁵⁰ *Id.*

²⁵¹ See proposed Rules 12303(b), 13303(b).

²⁵² See Notice at 2146.

²⁵³ *Id.* at 2146–47 (explaining that the proposed rule change aims “[t]o clarify to parties the requirements related to third party claims and Submission Agreements”).

²⁵⁴ See Pickard Letter at 5.

²⁵⁵ See Cornell Letter at 3.

Two commenters supported these proposed rule changes,²⁶⁵ and a third offered no objection.²⁶⁶

The Commission believes that by addressing procedural and other ambiguities in the relevant rules, these proposed rule changes should enhance the transparency of the forum's procedures and promote their consistent and efficient application. For this these reasons, the Commission finds that the proposed rule changes are reasonably designed to protect investors and the public interest.

8. Combining Claims

As stated above, the proposed rule change would address which panel among those in multiple cases involving separate but related claims would decide a motion to combine such claims into a single arbitration or reconsider the DRS Director's previous decision on a motion to combine such claims.²⁶⁷ Specifically, the original proposed rule change would have set forth rules governing two scenarios: (1) if a panel has been appointed to the lowest numbered case, the panel in that case would have the above-referenced authority; and (2) if a panel has been appointed to the highest numbered case (*i.e.*, the case with the latest filing date), but not to the lowest numbered case, the panel appointed to the highest numbered case would have the above-referenced authority.²⁶⁸ FINRA stated that this original proposed rule change would have codified current practice.²⁶⁹

One commenter offered no objection to this proposed rule change.²⁷⁰ A second commenter stated that as originally proposed, the proposed rule change would promote clarity and efficiency by codifying current practice.²⁷¹ However, this commenter noted that this original proposed rule change had an apparent gap—it did not address “what happens if a panel has only been appointed to cases numbered in the middle (*i.e.*, neither the lowest nor the highest) if more than two combinable claims are involved.”²⁷²

In its response, FINRA amended the proposed rule change to address this commenter's concerns. FINRA

explained that the original proposed rule change addressed the two most common situations in which a motion to combine claims is filed.²⁷³ But to provide greater clarity, FINRA amended this proposed rule change to provide that “[i]f a panel has been appointed to one or more cases [involving separate but related claims], the panel appointed to the lowest-numbered case with a panel” has the authority to: (1) combine separate but related claims into one arbitration; and (2) reconsider the DRS Director's decision on such a motion to combine claims.²⁷⁴

The Commission believes that by addressing ambiguities in the Codes and codifying existing practice, the proposed rule change enhances the transparency of the forum's procedures and promotes their consistent application in all arbitration cases. In addition, this proposed rule change should enhance the efficiency of the arbitration process by reducing the number of arbitrations hearing separate but related claims. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

9. Motions in Arbitration

As stated above, the proposed rule change would amend FINRA's rules governing parties' motions in arbitration. First, the proposed rule change would require the DRS Director to send all motions, responses, and replies to the panel after the last reply date expires, unless the arbitrator panel directs otherwise.²⁷⁵ If the DRS Director receives any submissions on the motion after the last reply date has elapsed, this proposed rule change would require the DRS Director to forward the submissions to the panel upon receipt, and the panel would determine whether to accept them.²⁷⁶ FINRA stated that this proposed rule change would codify an existing practice, bringing transparency and consistency to arbitration.²⁷⁷

Second, the proposed rule change would add cross-references to rules governing motions to separate or combine claims or arbitrations. In particular, the proposed rule change would clarify: (1) that the DRS Director may decide a motion to separate claims

or arbitrations prior to panel appointment, but the panel assumes that authority upon its appointment;²⁷⁸ and (2) which panel among multiple cases may combine separate but related claims into one arbitration or reconsider the DRS Director's decision to combine claims upon motion of a party (as discussed above).²⁷⁹

Third, the proposed rule change would clarify if a motion to amend a pleading is made after panel appointment, the amended pleading that should be included with the motion does not need to be a hard copy.²⁸⁰

One commenter supported these proposed rule changes, characterizing them as “clear benefit[s] for both claimants and respondents” that do not alter current procedures.²⁸¹

The Commission believes that by identifying and reducing ambiguity, the proposed rule change makes the arbitration process more transparent and promotes uniformity across arbitration cases. For these reasons, the Commission finds that the proposed clarifications are reasonably designed to protect investors and the public interest.

10. Witness Lists Shall Not Be Combined With Document Lists

As stated above, the Codes require that at least 20 days before the first scheduled hearing, all parties must: (1) provide all other parties—but not the DRS Director or arbitrators—with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced;²⁸² and (2) provide each other party—as well as the DRS Director—with the names and business affiliations of all witnesses they intend to present at the hearing.²⁸³ Separately, FINRA stated that in addition to producing copies of documents and other materials they intend to use at the hearing, parties often produce and file with the DRS

²⁷⁸ Proposed Rules 12503(e)(3), 13503(e)(3) (adding cross-references to Rules 12312, 12313, 13312, and 13313, as applicable, which identify the circumstances in which the DRS Director or a panel may separate claims or arbitrations).

²⁷⁹ Proposed Rules 12503(e)(4), 13503(e)(4) (adding cross-reference to proposed Rules 12314 or 13314, as applicable, which articulates who has authority to decide motions to combine claims). The addition of the proposed text to Rules 12503(e) and 13503(e) requires the renumbering of certain paragraphs in that subsection. *See* Notice at 2148 n.63.

²⁸⁰ *See* proposed Rules 12503(a)(4), 13503(a)(4).

²⁸¹ *See* Cornell Letter at 4. Another commenter offered no objection. *See* Pickard Letter at 5.

²⁸² *See* FINRA Rules 12514(a), 13514(a) (stating that “[t]he parties should not file the documents with the [DRS] Director or the arbitrators before the hearing.”).

²⁸³ FINRA Rules 12514(b), 13514(b).

²⁶⁵ PIABA Letter at 3; Cornell Letter at 3–4 (stating that this proposed rule change would codify respondents' current ability to file third-party claims, create the same procedures for filing third-party claims as those for amending a complaint, and promote simplicity and fairness in the process).

²⁶⁶ Pickard Letter at 5.

²⁶⁷ *See* proposed Rules 12314(b), 13314(b); *see also* Amendment No. 1 at 4.

²⁶⁸ *See* Notice at 2147.

²⁶⁹ *See id.*

²⁷⁰ Pickard Letter at 5.

²⁷¹ Cornell Letter at 4.

²⁷² *Id.*

²⁷³ FINRA April Letter at 7–8.

²⁷⁴ Proposed Rules 12314(b)(1), 13314(b)(1); FINRA April Letter at 7–8; *see also* Amendment No. 1 at 4.

²⁷⁵ Proposed Rules 12503(d), 13503(d).

²⁷⁶ *Id.*

²⁷⁷ *See* Notice at 2148 (stating that “[i]n practice, DRS sends all motions and all responses to the panel after the last reply date has elapsed, unless otherwise directed by the panel.”).

Director a single document listing such documents and other materials.²⁸⁴ FINRA explained that even though FINRA Rules 12514(a) and 13514(a) indicate that “parties should not file the documents with the [DRS] Director or arbitrators before the hearing,” the Codes do not currently include language regarding the sharing of document lists that parties may choose to create before the hearing.²⁸⁵ As such, parties who choose to create document lists, often file such lists with the DRS Director, along with the witness list.²⁸⁶ When parties file combined lists, FINRA stated that it endeavors to remove any potentially prejudicial or inadmissible materials (typically found in a party’s list of documents) from the combined lists before forwarding the witness lists to the arbitrators.²⁸⁷ To better protect against the risk of inadvertent disclosure of prejudicial or inadmissible materials, the proposed rule change would expressly provide that if a party creates a list of documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced, it may serve the list on all other parties, but shall not combine the list with the witness list filed with the DRS Director pursuant to Rule 12514(b) or 13514(b), as applicable.²⁸⁸

One commenter offered “no strong objection,” but observed that FINRA arbitrators prefer identifying admissible documents and materials prior to the hearing to avoid mid-hearing delays.²⁸⁹ A second commenter supported this proposed rule change, emphasizing that it would reduce work for the DRS Director and minimize unintentional disclosures of confidential information to arbitrators without imposing a significant burden on the parties.²⁹⁰

The Commission believes the proposed rule change would reduce the risk of unintentional disclosure of prejudicial information to arbitrators without imposing a new obligation upon the parties. By more clearly setting forth the requirements of parties in arbitration, the proposed rule change would enhance the fairness of the arbitration process by helping to limit the exposure of prejudicial or

inadmissible materials to the panel. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

11. Hearing Records

a. Allocation to Parties of Responsibilities for Hearing Records

The Codes require the DRS Director to “make a tape, digital, or other recording of every hearing.”²⁹¹ The official record of an arbitration hearing is the DRS Director’s tape, digital, or other recording of every arbitration hearing;²⁹² however, if a party chooses to make a stenographic record of a hearing, a panel may decide in advance of the hearing that the stenographic record will be the official record of the hearing.²⁹³ If the DRS Director’s recording is the official record, the panel “may order the parties to provide a transcription of the recording” and “copies of the transcription must be provided to each arbitrator, served on each party, and filed with the Director.”²⁹⁴ If a party’s stenographic record is the official record, “a copy must be provided to each arbitrator, served on each other party, and filed with the Director.”²⁹⁵ Further, “[t]he cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.”²⁹⁶ But the Codes do not specify which party must provide to each arbitrator, serve on each other party, and file with the DRS Director a copy of the official record.²⁹⁷ The proposed rule change would assign that responsibility to the party or parties: (1) ordered to provide a transcription of the DRS Director’s recording; or (2) electing to make a stenographic record.²⁹⁸

One commenter offered no objection.²⁹⁹ A second commenter opposed this proposed rule change as drafted.³⁰⁰ Specifically, the commenter opposed the appropriateness of requiring a claimant with limited financial means to produce a transcription of a hearing record.³⁰¹ Noting the “high costs” associated with

the provision of a transcription of a hearing record, the commenter recommended that FINRA: “(1) provide guidelines on the circumstances under which the panel might order hearing records from a party; (2) consider only allowing the panel to order hearing records from member firms; and (3) provide waivers or other forms of financial and legal assistance to indigent parties who cannot afford to provide the hearing records and whose case might be jeopardized as a result.”³⁰²

In response, FINRA declined to amend this proposed rule change.³⁰³ FINRA explained that in cases where the DRS Director’s recording is the official record, a panel usually orders a transcript of the recording only upon a motion of a party, and that because the digital recording made by the DRS Director continues to be the official record of a hearing, these motions are rare.³⁰⁴ When such a motion is made, the parties may litigate the motion by addressing, among other things, whether a transcript should be ordered at all or which party should bear the burden of generating the transcript.³⁰⁵ In that process, a party could raise—and an arbitration panel would be well-positioned to consider—objections based on financial grounds.³⁰⁶ For that reason, FINRA also declined “to provide for waivers or other forms of financial and legal assistance to parties who may not have the financial resources to pay for hearing records.”³⁰⁷ FINRA indicated, however, “that guidance on the process for ordering a transcript from a party may be helpful to the parties in preparing their case,” so it stated that it would provide such guidance on its website if the Commission approves this proposed rule change.³⁰⁸

The Commission believes it is reasonable that FINRA has determined to rest the obligation of providing, serving, and filing a transcription or stenographic record on the party responsible for creating that record (in the case of a transcription) or on the party that elected to make the record (in the case of a stenographic record). Clearly identifying the party responsible for providing, serving, and filing a transcription or stenographic record should help clarify the obligations of the parties. Additionally, the panel should be well positioned to consider any cost-

²⁸⁴ Notice at 2148.

²⁸⁵ *Id.*; see FINRA Rules 12514(a), 13514(a).

²⁸⁶ See Notice at 2148; see also FINRA Rules 12514(a), 13514(a).

²⁸⁷ See Notice at 2148.

²⁸⁸ Proposed Rule 12514(a), 13514(a); see Notice at 2148.

²⁸⁹ Pickard Letter at 6 (indicating that arbitrators “prefer identifying admissible documents and materials prior to the hearing to avoid mid-hearing delays, and may use exhibit lists before and during the hearing for ease of reference.”).

²⁹⁰ Cornell Letter at 4.

²⁹¹ Current FINRA Rules 12606(a)(1), 13606(a)(1).

²⁹² FINRA Rules 12606(a)(3), 13606(a)(3).

²⁹³ FINRA Rules 12606(b)(1), 13606(b)(1).

²⁹⁴ FINRA Rules 12606(a)(2), 13606(a)(2).

²⁹⁵ FINRA Rules 12606(b)(2), 13606(b)(2).

²⁹⁶ *Id.*

²⁹⁷ Notice at 2148.

²⁹⁸ Proposed Rules 12606(a)(2), 13606(a)(2), 12606(b)(2), 13606(b)(2).

²⁹⁹ Pickard Letter at 6.

³⁰⁰ Cornell Letter at 5.

³⁰¹ See *id.*

³⁰² *Id.*

³⁰³ FINRA April Letter at 9 n.28 and accompanying text.

³⁰⁴ *Id.*

³⁰⁵ See *id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

related issues raised by the parties. For these reasons, this proposed rule change is reasonably designed to protect investors and the public interest.

b. Record of Executive Sessions

As noted above, the Codes require the DRS Director to “make a tape, digital, or other recording of every hearing.”³⁰⁹ Although the Codes do not specifically state that executive sessions will not be recorded, as a matter of practice, executive sessions are not recorded because they are not part of the official record of the hearing.³¹⁰ Rather, executive sessions are “discussions among arbitrators” outside the presence of the parties, the parties’ representatives, witnesses, and stenographers.³¹¹ The proposed rule change would codify this practice by providing that the DRS Director will not make an official recording of any executive sessions, *i.e.*, discussions among arbitrators outside the presence of the parties, witnesses, and stenographers.³¹² FINRA stated that this proposed rule change would promote “transparency and consistency” by codifying an existing practice.³¹³

One commenter addressed this proposed rule change, offering no objection.³¹⁴

The Commission believes that maintaining the confidentiality of executive session deliberations encourages candid discourse about a case among arbitrators. Specifically, the expectation of a private deliberation that is not recorded, in which each arbitrator can speak candidly, provides an opportunity to sharpen their assessments of a case and helps promote sound decision-making. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

12. Dismissal of Proceedings for Insufficient Service

As stated above, the Codes require parties, other than those proceeding pro se, to serve all pleadings and other documents through the Portal.³¹⁵ If a party who is served fails to submit an answer, DRS reviews the service history with the panel and asks the panel to decide whether service was complete and sufficient before the case may proceed to hearing.³¹⁶ Although the

Codes do not address what action the panel should take if it determines that service was insufficient, current practice permits a panel to dismiss a claim or arbitration without prejudice (*i.e.*, a party can refile their claim in the future) if it finds insufficient service.³¹⁷ To promote “transparency and consistency,” the proposed rule change would expressly permit a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service upon a respondent.³¹⁸

One commenter supported this proposed rule change, agreeing that it codifies current practice and “ensures that errors and misunderstandings are minimized.”³¹⁹ A second commenter offered no objection.³²⁰

The Commission believes that permitting a panel to dismiss a claim or arbitration without prejudice if it finds insufficient service of a pleading or other document reasonably balances a respondent’s need for appropriate notice with a party’s ability to refile a claim without prejudice so the case can move forward. The Commission also believes that the proposed rule change would promote transparency about FINRA’s arbitration process and help ensure consistent procedures across arbitration cases. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

13. Dismissal of Claims Requires Issuance of an Award

As stated above, an award is a document stating the final disposition of a case.³²¹ The Codes require FINRA to publish awards, which it does on its website.³²² Currently, although the Codes permit a panel to grant a motion to dismiss a party’s entire case after the conclusion of that party’s case-in-chief,³²³ the Codes do not specifically address whether such a dismissal requires the issuance, and publication, of an award.³²⁴ FINRA stated that as the dismissal of all a claimant’s claims disposes of a case, it is current practice to require the issuance, and publication, of an award for such dismissals.³²⁵ The proposed rule change would codify this practice by requiring a panel granting a motion to dismiss all claims to issue a

“decision” containing the elements of a written award and make the decision “publicly available as an award.”³²⁶

One commenter supported this proposed rule change.³²⁷ A second commenter objected to the proposed rule change, stating that the publication of an award dismissing all of a claimant’s claims would negatively impact the respondent’s reputation.³²⁸ Specifically, because all arbitration awards are published in a “permanent, unredacted database,” they “reiterate the details of the customer complaint information about each broker, regardless of the complaint’s merit.”³²⁹ Similarly, because a motion to dismiss will be granted after claimant’s case-in-chief and before respondents present their own case, the award “will not reflect any defense by [r]espondent[.]”³³⁰ The commenter concluded that “[i]f a customer complaint has so little merit that it is disposed of through a Motion to Dismiss . . . , there is no regulatory purpose in ensuring that the member firm and/or registered representatives implicated by the complaint continue to have their reputations tainted by the allegations.”³³¹

In response, FINRA acknowledged that the award may not reflect any defense raised by respondents.³³² However, FINRA stated that the Codes permit arbitrators to include a rationale underlying the award to provide

³²⁶ *Id.*; see proposed Rule 12504(b), 13504(b); FINRA Rules 12904(e), 13904(e) (describing elements of an award).

³²⁷ Cornell Letter at 5.

³²⁸ Pickard at 6–7. Another commenter asserted that the proposed rule change would improperly amend the meaning of “final award” to include a panel’s dismissal of some, but not all, of a claimant’s claims. See letter from Anonymous to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Sep. 5, 2023). The Commission believes that this comment misinterprets the proposed rule change. In the Notice, FINRA stated that currently a panel renders a written award if it grants a motion to dismiss all of a claimant’s claims at the conclusion of the case in chief. See Notice at 2149. The proposed rule change would codify this practice. See proposed Rules 12504(b); 13504(b). FINRA further stated that if a panel grants a motion to dismiss some but not all of the claimant’s claims, the hearing would proceed as to the remaining claims and at the conclusion of the hearing, the panel would issue an award that disposes of each claim. See Notice at 2149 n.84 (citing FINRA Dispute Resolution Services Arbitrator’s Guide, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>). The proposed rule change is not modifying this practice.

³²⁹ *Id.* at 6.

³³⁰ *Id.*

³³¹ *Id.* This commenter also asked FINRA to develop a mechanism to remove information from or redact records in its public arbitration award database. *Id.* at 7–8. As FINRA has not proposed rules related to the redaction or removal of information from that database, this comment is outside the scope of this proposed rule change.

³³² See FINRA August Letter at 7.

³¹⁷ *Id.* at 2148–49.

³¹⁸ Proposed Rules 12700(c), 13700(c); see Notice at 2148–49.

³¹⁹ Cornell Letter at 5.

³²⁰ Pickard Letter at 6.

³²¹ See *supra* notes 158–159 and accompanying text.

³²² See *supra* note 160.

³²³ See FINRA Rules 12504(b), 13504(b).

³²⁴ Notice at 2149.

³²⁵ *Id.*

³⁰⁹ Current FINRA Rules 12606(a)(1), 13606(a)(1).

³¹⁰ Notice at 2148.

³¹¹ See *id.*

³¹² Proposed Rules 12606(a)(1), 13606(a)(1).

³¹³ *Id.*

³¹⁴ See Pickard Letter at 6.

³¹⁵ FINRA Rules 12300, 13300; see *supra* note 39.

³¹⁶ Notice at 2148.

relevant context.³³³ In addition, FINRA stated that after a panel dismisses a case at the conclusion of the case-in-chief, the firm must file an amended Uniform Application for Securities Industry Registration or Transfer (“Form U4”) for the associated person to report the final disposition of the case as dismissed.³³⁴ FINRA stated that along with the final disposition, an associated person can provide a brief summary or add context on Form U4 regarding the circumstances leading to the customer arbitration, as well as the current status or final disposition.³³⁵ This updated information is subsequently disclosed on the associated person’s BrokerCheck report, which is publicly available to investors.³³⁶

The Commission believes that this proposed rule change should promote transparency about FINRA’s arbitration process and help ensure consistent treatment of awards. Specifically, the proposed rule change equally requires all arbitration awards, including awards granting a motion to dismiss all claims, to be published. These published awards should provide current and future parties to an arbitration with data that could help inform the administration of their cases. The Commission acknowledges the commenter’s concern that a published award granting a motion to dismiss all claims may not reflect any defense raised by respondents. However, these concerns should be ameliorated by the fact that the Codes permit arbitrators to include a rationale underlying the award, providing relevant context to the dismissal of the claim such as the circumstances under which the claim was dismissed. In addition, an associated person may provide context on Form U4 regarding the circumstances leading to the customer arbitration, as

well as the claim’s current status or final disposition. For these reasons, the Commission finds that this proposed rule change is reasonably designed to protect investors and the public interest.

IV. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and, in general, protect investors and the public interest.³³⁷

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act³³⁸ that the proposed rule change (SR–FINRA–2022–033), as amended by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³⁹

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023–19729 Filed 9–12–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98321; File No. SR–NASDAQ–2022–079]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Rules 4702(b)(14) and (b)(15) Concerning Dynamic M–ELO Holding Period

September 7, 2023.

I. Introduction

On December 21, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to replace the static holding period requirements for Midpoint Extended Life Orders and Midpoint Extended Life Orders Plus Continuous Book with

dynamic holding periods. The proposed rule change was published for comment in the **Federal Register** on January 10, 2023.³ On February 22, 2023, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On March 9, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed. On April 7, 2023, the Commission provided notice of filing of Amendment No. 1 and instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁶ On July 6, 2023, pursuant to Section 19(b)(2) of the Act,⁷ the Commission designated a longer period on proceedings to determine whether to approve or disapprove the proposed rule change.⁸ On July 18, 2023, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and superseded the proposed rule change as amended by Amendment No. 1. The Commission received comments on the proposed rule change.⁹ The Commission is publishing this Notice and Order to solicit comment on Amendment No. 2 in Sections II and III below, which sections are being published verbatim as filed by the Exchange, and to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rules 4702(b)(14) and (b)(15) of the Exchange’s Rulebook to replace the static holding period requirements for Midpoint Extended Life Orders and Midpoint Extended Life Orders Plus Continuous Book with dynamic holding periods. This Amendment No. 2

³ See Securities Exchange Act Release No. 92844 (January 4, 2023), 88 FR 1438.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 96963, 88 FR 12710 (February 28, 2023).

⁶ See Securities Exchange Act Release No. 97263, 88 FR 22498 (April 13, 2023).

⁷ 15 U.S.C. 78s(b)(2).

⁸ See Securities Exchange Act Release No. 97844, 88 FR 44423 (July 12, 2023).

⁹ All comments received by the Commission on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2022-079/srnasdaq2022079.htm>.

³³³ See *id.*; see also FINRA Rules 12904(f) and 13904(f).

³³⁴ See FINRA August Letter at 7 (citing FINRA By-Laws, Article V, Sections 2(c), 3(a) and 3(b)).

³³⁵ See *id.* at 7 n.30.

³³⁶ FINRA Rule 8312 (FINRA BrokerCheck Disclosure) governs the information FINRA releases to the public through its BrokerCheck system. Information available to investors through BrokerCheck includes, among other things, information reported on the most recently filed “Registration Forms” (with limited exceptions) for both member firms and registered individuals, and summary information about certain arbitration awards against the firm involving a securities or commodities dispute with a public customer; see also FINRA Rule 8312(b)(2)(A) (using the term “Registration Forms” to refer collectively to Form U4, the Uniform Termination Notice for Securities Industry Registration (Form U5), the Uniform Disciplinary Action Reporting Form (Form U6), the Uniform Application for Broker-Dealer Registration (Form BD), and the Uniform Request for Broker-Dealer Withdrawal (Form BDW)). The BrokerCheck website is available at brokercheck.finra.org.

³³⁷ 15 U.S.C. 78o–3(b)(6).

³³⁸ 15 U.S.C. 78s(b)(2).

³³⁹ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

supersedes the original filing and Amendment No. 1¹⁰ in their entireties.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

III. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rules 4702(b)(14) and (15) of the Exchange's Rulebook to replace the static 10 millisecond holding period requirements for its Midpoint Extended Life Order ("M-ELO") and Midpoint Extended Life Order Plus Continuous Book ("M-ELO+CB") Order Types with dynamic holding periods ("Dynamic M-ELO and M-ELO+CB" or collectively, "Dynamic M-ELO").

Background

In 2018, the Exchange introduced the M-ELO, which is a Non-Displayed Order priced at the Midpoint between the National Best Bid and Offer ("NBBO") and which is eligible for execution only against other eligible M-ELOs and only after a minimum of one-half second passes from the time that the System accepts the order (the "Holding Period").¹¹ In 2019, the Exchange introduced the M-ELO+CB, which closely resembles the M-ELO, except that a M-ELO+CB may execute at the midpoint of the NBBO, not only against other eligible M-ELOs (and M-ELO+CBs), but also against Non-Displayed Orders with Midpoint

Pegging and Midpoint Peg Post-Only Orders ("Midpoint Orders") that rest on the Continuous Book for at least one-half second and have Trade Now enabled.¹²

When the Exchange designed M-ELO, it originally set the length of the Holding Period at one-half second because it determined that this time period would be sufficient to ensure that likeminded investors would interact only with each other, and with minimal market impacts. The Exchange believed that the longer length of the M-ELO Holding Period and its simplicity in design would provide greater protection for participants than they could achieve through competing delay mechanisms.

In 2020, however, the Exchange shortened the length of the Holding Period to 10 milliseconds.¹³ The Exchange did so after studying two years of actual use and performance of M-ELOs, as well as customer feedback. That is, the Exchange came to understand that, while users of M-ELO and M-ELO+CB are less concerned with achieving rapid executions of their Orders than are other participants, they are not indifferent about the length of time in which their M-ELOs and M-ELO+CBs must wait before they are eligible for execution. Indeed, participants informed the Exchange that in certain circumstances, such as when they sought to trade symbols that on average had a lower time-to-execution than a half-second, they were reticent to enter M-ELOs or M-ELO+CBs. They indicated that the associated Holding Periods for these Order Types were longer than necessary to achieve the desired protections and that, during the residual portion of the Holding Periods, they risked losing out on favorable execution opportunities that would otherwise be available to them had they placed a non-MELO order.

Based upon this feedback, the Exchange studied the potential effects of reducing the length of the Holding Periods for both M-ELOs and M-ELO+CBs (as well as for Midpoint Orders that would execute against M-ELO+CBs). Ultimately, the Exchange determined that it could reduce the Holding Periods to 10 milliseconds without compromising the protective power that M-ELO and M-ELO+CB are intended to provide to participants and

investors.¹⁴ Thus, the Exchange determined that shortening the Holding Periods to 10 milliseconds for M-ELOs and M-ELO+CBs would increase the efficacy of the mechanism while not undermining the power of those Order Types to fulfill their underlying purpose of minimizing market impacts. At the same time, the Exchange determined that a reduction in the Holding Periods to 10 milliseconds would dramatically add to the circumstances in which M-ELOs and M-ELO+CBs would be useful to participants. In its M-ELO Timer Approval Order, the Commission agreed with the Exchange:

The Commission notes that, with the proposed ten-millisecond Holding Period and Resting Period, M-ELOs and M-ELO+CBs would continue to be optional order types that are available to investors with longer investment time horizons, including institutional investors. The Commission also believes that the proposal could make M-ELOs and M-ELO+CBs more attractive for securities that on average have a time-to-execution of less than one-half second and, for investors who currently do not use M-ELOs and M-ELO+CBs for these securities, provide optional order types that could enhance their ability to participate effectively on the Exchange. The Commission notes that, if market participants determine that the proposal would make M-ELOs and M-ELO+CBs less attractive for their particular investment objectives, such market participants may elect to reduce or eliminate their use of these optional order types. Moreover, as noted above, the Exchange will continue to conduct real-time surveillance to monitor the use of M-ELOs and M-ELO+CBs to ensure that such usage remains appropriately tied to the intent of the order types. If, as a result of such surveillance, the Exchange determines that the shortened

¹⁴ The Exchange examined each of its historical M-ELO executions to determine at what Midpoints of the NBBO the M-ELOs would have executed if their Holding Periods had been shorter than one-half second (500 milliseconds). After examining the historical effects of shorter Holding Periods of between 10 milliseconds and 400 milliseconds, the Exchange determined that a reduction of the M-ELO Holding Period to as short as 10 milliseconds would have caused an average impact on mark-outs of only 0.10 basis points (across all symbols). In other words, compared to the execution price of an average M-ELO with a one-half second Holding Period, the Exchange found that a M-ELO with a 10 millisecond Holding Period would have had an average post-execution impact that was only a tenth of a basis point per share—a difference in protective effect that is immaterial. See Nasdaq, "The Midpoint Extended Life Order (M-ELO); M-ELO Holding Period," available at <https://www.nasdaq.com/articles/the-midpoint-extended-life-order-m-elo%3A-m-elo-holding-period-2020-02-13> (analyzing effects of shortened Holding Periods on M-ELO performance).

¹⁰ See SR-Nasdaq-2022-079 Amendment No. 1 (March 9, 2023), at <https://www.sec.gov/comments/sr-nasdaq2022-079/srnasdaq2022079-20159016-327215.pdf>.

¹¹ See Securities Exchange Act Release No. 34-82825 (March 7, 2018), 83 FR 10937 (March 13, 2018) (SR-NASDAQ-2017-074) ("M-ELO Approval Order").

¹² See Securities Exchange Act Release No. 34-86938 (September 11, 2019), 84 FR 48978 (September 17, 2019) (SR-NASDAQ-2019-048) ("M-ELO+CB Approval Order").

¹³ See Securities Exchange Act Release No. 34-88743 (April 24, 2020), 85 FR 24068 (April 30, 2020) (SR-NASDAQ-2020-011) ("M-ELO Timer Approval Order").

Holding Period does not serve its intended purpose or adversely impacts market quality, the Exchange would seek to make further recalibrations.¹⁵

For similar reasons and with even better potential results for participants, the Exchange now proposes to further refine the length of the Holding Periods for M–ELOs and M–ELO+CBs, this time through the application of innovative and patent pending machine learning technology.

Dynamic M–ELO

After receiving feedback from participants that even 10 millisecond Holding Periods for M–ELO and M–ELO+CB may, at times, exceed what is necessary to accomplish the underlying intent of these Order Types, the Exchange began to experiment with making further refinements to the duration of the Holding Periods. Ultimately, the Exchange concluded that shorter Holding Periods could achieve the same, if not better results for participants in terms of mark-outs, but not in all circumstances. That is, where prices of the underlying securities are stable, and not subject to imminent unfavorable changes, M–ELOs and M–ELO+CBs face lower risks of confronting spread-crossing orders, such that shorter Holding Periods could suffice to protect M–ELOs and M–ELO+CB from such orders. In periods of heightened price volatility, however, M–ELOs and M–ELO+CBs also face heightened risks, such that longer Holding Periods would continue to be beneficial in protecting M–ELOs and M–ELO+CBs from such risks. Thus, the Exchange determined that another across-the-board reduction of the static 10 millisecond Holding Periods would be sub-optimal because it could impact the performance of the M–ELO and M–ELO+CB Order Types during periods of heightened volatility.

In light of these observations, the Exchange tasked its artificial intelligence and machine learning laboratory (the “AI Core Development Group”) to explore whether it could employ these innovative technologies to optimize the length of M–ELO and M–ELO+CB Holding Periods during various states of price volatility, and then to vary the lengths of the Holding Periods dynamically during the lifecycles of M–ELOs and M–ELO+CBs, with the objectives of improving the performance of these Order Types while also further reducing opportunity costs.

As the Exchange explains in greater depth in the attached White Paper,¹⁶ the AI Core Development Group proceeded to develop an artificial intelligence-based timer control system that will achieve these objectives.¹⁷ The AI Core Development Group did so by using reinforcement learning techniques—machine learning paradigms which develop optimal solutions to problems over time by taking actions to solve them, generating feedback on the results of such actions, applying that feedback to direct and improve the next round of solutions, and then repeating the feedback loop until the paradigm achieves optimized solutions.

In this instance, the AI Core Development Group applied reinforcement learning techniques to a simulation of the M–ELO Book that it constructed using a representative data set from the first quarter of 2022 (the “Training Period”). The Training Period data consisted of 380 out of the 6,257 symbols on the M–ELO Book (accounting for approximately 67 percent of M–ELO volume). The symbols chosen reflect both actively-traded and thinly-traded securities, and both low-priced and high-priced securities.

The AI Core Development Group then developed a machine learning model and applied it to the Training Period data. The Group programmed the model to value the achievement of higher fill rates or lower mark-outs than that which occurred in a historical simulation of M–ELOs and M–ELO+CBs involving the Training Period data.¹⁸ The Group then programmed the model to seek to achieve its goals by taking one of five possible actions with respect to the duration of the Holding Periods at

30 second intervals¹⁹ for each symbol during each trading day of the Training Period. That is, at each 30 second interval, the model evaluated market conditions for each symbol over the prior 30 second period and either kept the Holding Periods the same, increased/decreased them by 0.25 milliseconds, or increased/decreased them by 0.50 milliseconds.²⁰ After each decision-making round, the model utilized the results to inform its actions at the next 30 second increment.

In making its decisions, the model (again, drawing upon a combination of historical SIP and M–ELO-specific data) considered 142 categories of data points.²¹ A confluence of data points that correlated with an increase in volatility tended to cause the model to increase the durations of Holding Periods, including increases in the standard deviation of NBBO prices, the number of unique participants placing sell orders on M–ELO and M–ELO+CB, and the volume-weighted average of the NBBO spread. Conversely, a confluence of data points that correlated with greater price stability tended to cause the model to decrease the durations of Holding periods, such as an increase in the median and max number of shares per trade and the number of resting bids left in the M–ELO and M–ELO+CB Book.

The AI Core Development Team produced variations of its model that prioritized achievement of the lowest mark-outs, the highest fill rates, and a blend of these two objectives.²² Through

¹⁹ See *id.*

²⁰ The AI Core Development Group experimented with a range of permissible Holding Period durations. Ultimately, it concluded that it could produce better outcomes for M–ELO and M–ELO+CB participants than the existing approach using Holding Periods as low as 0.25 milliseconds and as high as 2.5 milliseconds, under normal market conditions.

²¹ Nasdaq attaches a full list of these data elements (attached hereto [sic] as “Exhibit 3(b)”), along with an observation of the strength of the correlations that currently exist between changes to those data values and decisions the system makes to set the duration of Holding Periods at any given time. The Exchange notes that the version of this list attached to this Amendment No. 2 supersedes prior versions attached to prior versions of this filing. This version of the list includes expanded explanations of the terminology used therein. See also White Paper, *supra*, at 31, for a description of these features.

²² The AI Core Development Group also applied to the model a paradigm called “retraining” to combat the degradation of model performance that can otherwise occur as the reference data it uses for initial comparison becomes stale. Finally, the AI Core Development group added a stability protection mechanism to the model to provide maximum production to participants in the event that the model observes extraordinary levels of instability in the National Best Bid and Offer during the prior three seconds as compared to reference data. When the model detects such instability, it is

¹⁶ See Diana Kafkes et al., “Applying Artificial Intelligence & Reinforcement Learning Methods Towards Improving Execution Outcomes,” SSRN, October 19, 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4243985 (attached hereto [sic] without modification from the prior version as Exhibit 3(a)) (the “White Paper”).

¹⁷ Although the AI Core Development Group acknowledges that an optimal Holding Period would update with every incoming order, it determined that training a reinforcement learning model on every order would be too difficult to program and too difficult to implement given the nanosecond latency requirements of the Exchange. The Group then investigated more feasible update cadences and determined the point at which optimal outcomes were best balanced with the level of programming and implementation difficulty to be between 15 and 30 second updates. Ultimately, the Group chose a 30 second update cadence to give the model the greatest opportunity to learn between potential actions.

¹⁸ As the White Paper explains, the Group developed a model to simulate activity on the Exchange involving M–ELOs and M–ELO+CBs during the Training Period. See White Paper, *supra*, at 10.

¹⁵ M–ELO Timer Approval Order, *supra*, at 85 FR 24069.

a process of learning and experimentation involving a combination of historical and simulated data, the AI Core Development Group settled on a Dynamic M-ELO model that achieved substantial simulated performance improvements for users of M-ELO and M-ELO+CB—both in terms of mark-outs and fill rates—as compared to the static 10 millisecond Holding Periods. As the White Paper explains in greater detail, Dynamic M-ELO yielded an average combined volume-weighted (simulated) improvement of 31.7 percent, including a 20.3 percent increase in fill rates and a 11.4 percent reduction in mark-outs.²³ The White Paper provides a more fulsome explanation of these improvements.²⁴

Based upon these exciting results, the Exchange now proposes to amend Rule 4702(b)(14) and (15) to replace the static 10 millisecond timers applicable to M-ELO and M-ELO+CB with Dynamic M-ELO Holding Periods. Using the Exchange's "proprietary assessment of market conditions"²⁵ and patent pending technology, the Dynamic M-ELO system will evaluate and, as it deems necessary, adjust the length of the Holding Periods for each symbol comprising M-ELOs and M-ELO+CBs (and Midpoint Orders on the Continuous Book that opt to interact with M-ELO+CBs after resting on the Book) every 30 seconds throughout the Market Hours (each such 30 second interval, a "Change Event"). In so doing, Dynamic M-ELO will help participants to achieve a more optimized blend of the underlying purposes of the M-ELO and M-ELO+CB Order Types: protection against adverse selection

programmed to increase the length of the Holding Period to 12 milliseconds for a period of 750 milliseconds.

²³ See White Paper, *supra*, at 22.

²⁴ See *id.*

²⁵ As set forth in the proposed rule text, the phrase "proprietary assessment of market conditions" refers to the Exchange's evaluation of prevailing market conditions for a given symbol using an algorithm programmed to set a Holding Period duration which, at each Change Event, achieves an optimal blend of two objectives: maximization of M-ELO fill rates; and minimization of M-ELO mark-out rates. As the rule text states and as is discussed below, the algorithm ingests and analyzes 142 data points, which the Exchange identifies and describes in Exhibit 3b hereto. The Exchange derives these data from a combination of public data and M-ELO data feeds. Furthermore, the Exchange conducts weekly retrainings of the algorithm, outside of Market Hours, to improve its performance relative to the immediately preceding period (in terms of the two aforementioned objectives). The Exchange deploys a retrained version of the algorithm only if it determines that doing so will, in fact, improve its performance relative to the immediately preceding period. The Exchange provides further information about the algorithm and the retraining process in a White Paper attached hereto [sic] as Exhibit 3a.

(low mark-outs) without sacrificing opportunities to achieve high-quality executions (high fill rates).

A proposed M-ELO or M-ELO+CB with a Dynamic Holding Period will operate as follows. At the outset of Market Hours (approximately 9:30:00 a.m.), the Exchange will impose initial Holding Periods of 1.25 milliseconds for M-ELOs and M-ELO+CBs in all symbols. Thereafter, Holding Periods for a given symbol will become eligible to change dynamically from the initial duration beginning at 9:30:30 a.m. and then at 30 second intervals thereafter during Market Hours. The Exchange will then apply to the M-ELO or M-ELO+CB Order a Holding Period that is of the duration that prevailed at the time of entry. For example, if participant A enters a M-ELO for symbol XYZ at 9:30:25 a.m., then Holding Period for that M-ELO will be 1.25 milliseconds. If at 9:30:30:00 a.m., the System decides to lower the duration of the Holding Period by 0.50 milliseconds, and then participant B enters a M-ELO for symbol XYZ at 9:30:45 a.m., then the System will assign a 0.75 millisecond Holding Period to participant B's M-ELO. To be clear, the System will determine Dynamic M-ELO Holding Periods independently for M-ELOs and M-ELO+CBs in each symbol.

During normal market conditions, the range of potential Holding Period durations for M-ELOs and M-ELO+CBs will be between 0.25–2.50 milliseconds, with the Holding Period duration being eligible to change by increments of either 0.25 or 0.50 milliseconds at each Change Event. Thus, if the Holding Period for a M-ELO in symbol XYZ is set at 0.75 milliseconds at 2:22:11 p.m., and at 2:22:41 p.m., the System determines to increase the duration of the Holding Period, it may do so only by 0.25 or 0.50 milliseconds during that event.

When a Change Event occurs, and the System determines to adjust the duration of a Holding Period for a symbol, that adjustment will apply, not only to all M-ELOs and M-ELO+CBs for that symbol entered within the 30 second period after the Change Event occurs, but also to M-ELOs and M-ELO+CBs entered prior to the Change Event with unexpired Holding Periods (with applicability retroactive to the time of Order acceptance). Thus, if a participant enters a M-ELO in symbol XYZ at 1:14:299 p.m., and the prevailing Holding Period applicable to that M-ELO is 2 milliseconds, and at 1:14:30 p.m., the System modifies the Holding Period to be 1.5 milliseconds, then the M-ELO will become eligible to execute at 1:14:3005 p.m. This is the case

because the M-ELO will have already expended 1 millisecond of its Holding Period as of the time of the Change Event; thereafter, the M-ELO will need to rest only another 0.5 milliseconds to become eligible to execute under the new 1.5 millisecond Holding Period (as measured from 1:14:299 p.m.). This last feature ensures that the M-ELO Book maintains time priority among M-ELOs and M-ELO+CBs in a dynamic environment. That is, it ensures that no M-ELO or M-ELO+CB with an unexpired Holding Period at the time of a Change Event will end up becoming eligible to execute later than a M-ELO entered after the Change Event which has a shorter Holding Period applicable to it.

If at any time, the System detects extraordinary instability in a symbol, then the System will activate a "stability protection mechanism" to provide an extra layer of protection to M-ELO and M-ELO users from the heightened risks of adverse selection that exists during such periods of instability.²⁶ The stability protection mechanism will override the prevailing Holding Periods for M-ELOs and M-ELO+CBs in a symbol experiencing extraordinary instability and immediately increase the duration of those Holding Periods to 12 milliseconds for a period of 750 milliseconds. The System may activate the stability protection mechanism even between Change Events. The System will evaluate, at each NBBO update, whether market conditions remain extraordinarily unstable and, if so, it will restart the 750 millisecond Stability Protected Period and maintain the 12 millisecond Holding Period until conditions stabilize. Once the System determines that market conditions have stabilized (*i.e.*, all measurements for the symbol are at or below the threshold value throughout the duration of the prevailing Stability Protected Period), the System will revert the duration of the Holding Periods to that which prevailed as of the Change Event that

²⁶ For purposes of this Rule, the System determines that "extraordinary instability" for a symbol exists through observations it makes following every change in the NBBO for that symbol that occurs during the trading day. When the NBBO changes, the System looks back at the prior three seconds of trading and measures the difference between the highest and the lowest NBBO midpoint values that occurred during that period, and then it compares that measurement to a threshold value for the symbol. The System concludes that extraordinary instability exists for a symbol if the measurement exceeds the threshold value. The threshold value for a symbol, in turn, is the difference between the highest and the lowest NBBO midpoint values for the symbol that, if applied to its trading activity during the prior trading day, would have caused the System to deem trading in the symbol to be extraordinarily unstable for as close to one percent of that day as possible.

occurred immediately prior to the activation of the stability protection mechanism or, if the stability protection mechanism was active when a Change Event occurred, to the duration selected at the immediately preceding Change Event. The System will then proceed to reevaluate the duration of the Holding Periods as per the regular schedule of Change Events.

The following is an illustration of the operation of the stability protection mechanism. At 11:10:04 a.m., the prevailing Holding Period for M-ELOs in symbol XYZ is 1.5 milliseconds. At the same time, the NBBO for symbol XYZ updates. The System looks back at the prior three seconds of trading in symbol XYZ and finds that during that period, the highest observed NBBO midpoint was \$10.05, and the lowest was \$10.00, such that the difference between these two values is a range of \$0.05. The System then looks back at trading behavior for symbol XYZ during the immediately preceding trading day. In doing so, the System calculates the value of the threshold that would have caused the symbol to be deemed extraordinarily unstable for one percent of the trading day; the System determines that this threshold value is a range of \$0.03. The System then compares the \$0.03 threshold to its measurement of the prior three seconds of NBBO changes (\$0.05), and concludes that over these past three seconds, the symbol is extraordinarily unstable. Accordingly, the System activates the stability protection mechanism and the Holding Period for M-ELOs in symbol XYZ immediately increases to 12 milliseconds for a period of 750 milliseconds. However, 5 milliseconds after the Stability Protection Period commences, the NBBO updates again, thus prompting the System to repeat its assessment of the stability of the symbol in light of the update. This reassessment reveals that the symbol remains unstable, such that a new Stability Protection Period of 750 milliseconds begins at that time (overriding the pre-existing Period). Over the course of this new Stability Protection Period, the NBBO shifts two more times, but each of the ensuing reassessments indicate that the NBBO ranges for the symbol have fallen below the \$0.03 threshold. The Stability Protection Period elapses 750 milliseconds after it began with the symbol remaining stable. Thus, the Holding Period reverts to 1.5 milliseconds.

If the Exchange halts trading in a symbol, then upon resumption of trading, any new M-ELO or M-ELO+CB in that symbol and any pending M-ELO or M-ELO+CB in that symbol with an

unexpired Holding Period will be subject to a new 12 milliseconds Holding Period (running from the time when trading resumes) until the next scheduled Change Event, at which point the System may determine to adjust that Holding Period to a duration within the range applicable under normal market conditions.²⁷ If, however, the System determines that extraordinary instability in the symbol exists, it will instead determine to activate the stability protection mechanism and maintain the duration of the Holding Period at 12 milliseconds for another 750 milliseconds. This design will help to ensure that M-ELOs and M-ELO+CBs receive added protection coming out of halt conditions.²⁸

The Exchange notes that same dynamic process described above will also apply to and govern the time periods during which Midpoint Orders on the Continuous Book must rest before they will become eligible to interact with M-ELO+CBs (provided that participants have opted for their Midpoint Orders to interact with M-ELO+CBs). Thus, the same Holding Period duration that the System sets for a M-ELO+CB in a symbol during Regular Market Hours will also be the length of time that a Midpoint Order must rest on the Continuous Book must rest before it may interact with a M-ELO+CB.

Apart from these impacts of Dynamic Holding Periods, M-ELOs and M-ELO+CBs will continue to behave as they do now in all respects, and as set forth in Rules 4702(b)(14) and (15).

It is important to note that within the parameters discussed herein and in the White Paper, the Exchange will continue to re-train Dynamic M-ELO and M-ELO+CB on a weekly basis (outside of market hours) so that the model will continue to learn from and act upon the basis of more recent SIP and M-ELO book data sets, and further

²⁷ Prior to commencement of a new 12 millisecond Holding Period for a new or pending M-ELO or M-ELO+CB following a Halt, the System will first determine whether the M-ELO or M-ELO+CB is or remains eligible for execution. That is, the Holding Period will commence only if, upon commencement of trading following the Halt, the midpoint price for the Order is within the limit set by the participant. If not, the System will hold the Order until the midpoint falls within the limit set by the participant, at which time the 12 millisecond Holding Period will commence.

²⁸ Also as a safeguard, the System will apply a default Holding Period of 12 milliseconds to a M-ELO or M-ELO+CB if ever it fails to receive a signal during a Change Event as to whether the System should adjust or maintain the duration of the prevailing Holding Period. The System will continue to apply the default 12 millisecond Holding Period until the next Change Event where the signal is restored and the System is able to act dynamically again.

improve its performance over time. The retraining process should not result in dramatic or unpredictable changes to the behavior of Dynamic M-ELO. The retraining process will not retrain the model from scratch each week; rather, it will retain the model's existing data inputs, knowledge base, and objectives—all without alteration. Retraining will result in new behaviors only as needed to address new scenarios that the model did not confront previously, and even then, only in a manner designed to further optimize outcomes, *i.e.*, reduce mark-outs or increase fill rates. If the System assesses that a retrained model would be worse than the existing model in achieving its objectives, then the System will continue to use the existing model and discard the retrained model. This retraining process is a standard and accepted practice for use of deep learning models; it helps to ensure that deep learning models not only work well, but that they continue to work well in dynamic circumstances.²⁹

The Exchange will not modify the underlying structure of Dynamic M-ELO and M-ELO+CB without first obtaining the Commission's approval to do so, including modifications to the data elements the model considers in making decisions about Holding Period durations, the conditions under which the model may adjust the duration of Holding Periods, the frequency with which the model may adjust the Holding Periods, the range of Holding Period durations available to M-ELOs and M-ELO+CBs, the increments by which Holding Periods may change at any given Change Event, and the procedures for triggering, maintaining, and ending 12 millisecond Holding Periods during times of extraordinary instability.³⁰ Although the Exchange will seek Commission approval prior to changing any of the data elements that the model considers, the Exchange will not seek Commission approval prior to retraining

²⁹ During periods where the model is not undergoing retraining, the System will behave predictably from day to day, such that its decisions when presented with given set of facts and circumstances in a given security on day 1 should be the same as they would be on day 2.

³⁰ In addition to the proposed changes described above, the Exchange proposes to delete an extraneous reference in Rule 4702(b)(15) to M-ELO+CB being eligible to execute against a Midpoint Order on the Continuous Book if the Continuous Book order has the "Midpoint" Trade Now Attribute enabled. In a prior filing, the Exchange folded the concept of "Midpoint Trade Now" into the general "Trade Now" Attribute. See Securities Exchange Act Release No. 34-92180 (June 15, 2021), 86 FR 33420 (June 24, 2021) (SR-NASDAQ-2021-044).

the model to adjust the weighting it applies to those data elements.

To aid investors in understanding and evaluating Dynamic M-ELO, Nasdaq will continue to publish weekly and monthly transparency statistics on Nasdaqtrader.com, as it does now, about the performance of its M-ELOs and M-ELO+CBs, including statistics listing the weekly numbers of shares and trades in M-ELOs by symbol, weekly aggregated M-ELO share and trade data, and monthly aggregated block data.³¹ Nasdaq also will continue to disclose monthly data on Nasdaq.com, as it does now (the M-ELO Monthly Report), about M-ELO and M-ELO+CB mark-outs (quote stability by time horizon) and fill rates.³² Moreover, Nasdaq will add statistics to the M-ELO Monthly Report about how frequently, on average, the System changes Holding Period durations for the top decile, median, and bottom decile of symbols, as measured by monthly M-ELO and M-ELO+CB trading volumes. Nasdaq will retain copies of each historical iteration of its models as part of its books and records, and make them available to the Commission upon request, should it wish to examine them to understand how the model changes over time. Furthermore, Nasdaq will publish an equity trader alert in advance of deploying a retrained version of Dynamic M-ELO whenever Nasdaq has reason to anticipate that the retrained version will produce results that differ materially from the prior version, *i.e.*, a projected change in mark-outs or fill-rates of 10% or more in either direction.

The Exchange acknowledges that systems necessary to implement Dynamic M-ELO, including the systems proposed that include model development and retraining processes, are “SCI Systems” within the meaning of Regulation Systems Compliance and Integrity (“Reg. SCI”),³³ and that the

Exchange, as an SCI Entity, remains responsible for compliance with all requirements of Reg. SCI, including, without limitation, to have policies and procedures reasonably designed to ensure that its SCI Systems operate in a manner that complies with the Act and the rules and regulations thereunder and Exchange’s rules and governing documents, among them a plan for assessments of the functionality of SCI Systems designed to detect systems compliance issues, including by responsible SCI personnel and by personnel familiar with applicable provisions of the Act and the rules and regulations thereunder and Exchange’s rules and governing documents.

Implementation

The Exchange intends to make the proposed change effective for M-ELOs and M-ELO+CBs in the Second or Third Quarter of 2023, but that time frame is subject to change. The Exchange will publish a Trader Alert in advance of making the proposed change effective.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by allowing for more widespread use of M-ELOs and M-ELO+CBs.

When the Commission approved the M-ELO and the M-ELO+CB, it determined that these Order Types are consistent with the Act because they “could create additional and more efficient trading opportunities on the Exchange for investors with longer investment time horizons, including institutional investors, and could provide these investors with an ability to limit the information leakage and the market impact that could result from their orders.”³⁶ Nothing about the Exchange’s proposal should cause the Commission to revisit or rethink this determination. Indeed, the proposal will not alter the fundamental design of these Order Types, the manner in which they operate, or their effects.

processor, exempt clearing agency subject to ARP, or SCI competing consolidator.” *Id.*

³⁴ 15 U.S.C. 78f(b).

³⁵ 15 U.S.C. 78f(b)(5).

³⁶ M-ELO Approval Order, *supra* 83 FR at 10938–39; M-ELO+CB Approval Order, *supra*, 84 FR at 48980.

Even with Dynamic M-ELO Holding Periods, M-ELOs and M-ELO+CBs will continue to provide their users with protection against information leakage and adverse selection—and they will do so at levels which are substantially undiminished from that which they provide now.³⁷

At the same time, however, the proposal will benefit market participants and investors by reducing the opportunity costs of utilizing M-ELOs and M-ELO+CBs. The proposal, in other words, will re-calibrate the lengths of the Holding Periods so that M-ELOs and M-ELO+CBs will operate in the “Goldilocks” zone—their Holding Periods will not be so short as to render them unable to provide meaningful protections against information leakage and adverse selection, but the Holding Periods also will not be too long so as to cause participants and investors to miss out on favorable execution opportunities. Nasdaq believes the proposal will render M-ELOs and M-ELO+CBs more useful and attractive to market participants and investors, and this increased utility and attractiveness, in turn, will spur an increase in M-ELO and M-ELO+CB use cases on the Exchange, both from new and existing users of M-ELOs and M-ELO+CBs. Ultimately, the proposal should enhance market quality by increasing opportunities for midpoint executions on the Exchange.

As Nasdaq explained above, the Proposal will operate within strict, well-defined, and transparent parameters. Although it will undergo weekly retraining (outside of market hours),³⁸ such retraining will aim to improve the performance of the model in achieving its twin objectives; retraining will not alter the inputs, objectives, or basic design parameters of Dynamic M-ELO without prior Commission approval.³⁹ Moreover, the Exchange will not deploy a retrained model if it fails to achieve performance improvements. To aid

³⁷ See note 6, *supra*.

³⁸ To be clear, performance statistics for Dynamic M-ELO cited herein and in the White Paper are based upon data derived from weekly, not daily retrains.

³⁹ As discussed above, Nasdaq will not seek Commission approval prior to allowing the model, as part of its re-training process, to vary the weighting of the data elements it ingests. Nasdaq believes this is appropriate because such variance will only occur to the extent that it will improve the model’s performance with respect to pre-defined objectives. Nasdaq will alert traders if the retraining process would result in substantial performance changes, and it will also publish statistics to help participants to assess performance themselves. Moreover, Nasdaq will retain historical iterations of its models for the Commission’s review, should it wish to examine how these models have changed over time.

³¹ See <http://www.nasdaqtrader.com/Trader.aspx?id=MELOSymbolData>.

³² See, e.g., <https://www.nasdaq.com/docs/M-ELO-Monthly-Report>. Nasdaq understands that current users of M-ELO and M-ELO+CBs independently monitor the performance of these Order Types. Nasdaq often receives feedback from such users about M-ELO and M-ELO+CB performance, which Nasdaq then factors into decisions about improvements and enhancements. Nasdaq expects that this feedback loop will continue after implementation of Dynamic M-ELO.

³³ 17 CFR 242.1000 *et seq.* As set forth in Reg. SCI, the term “SCI Systems” means “means all computer, network, electronic, technical, automated, or similar systems of, or operated by or on behalf of, an SCI entity that, with respect to securities, directly support trading, clearance and settlement, order routing, market data, market regulation, or market surveillance.” *Id.* at 242.1000. An “SCI Entity” means “an SCI self-regulatory organization, SCI alternative trading system, plan

investors in evaluating Dynamic M-ELO, the Exchange will publish statistics about its performance, including as to mark-outs and fill rates, as well as statistics about how frequently the System changes Holding Period durations. To further facilitate accountability, the Exchange will retain each historical iteration of its model as part of its books and records, and make such information available to the Commission, upon request. The Exchange will also publish equity trader alerts whenever retraining will result in a performance change of 10% or more.

Nasdaq notes that the twin objectives it prescribes for the model involve the absolute values of mark-outs and fill rates; they are not designed to further the performance of any participant or any category of participant. Furthermore, Nasdaq performed internal tests of its AI model to detect indications of harmful bias in its performance results, and such tests concluded that no such indications exist. That is, the Exchange reviewed the impact on fill rates and mark-outs of Dynamic M-ELO, as compared to the “static” M-ELO, for those firms that accounted for more than 95% of M-ELO activity on the Exchange during Q1 2022.⁴⁰ The Exchange analyzed results both in an absolute and a relative sense. Testing revealed that all participants experienced at least some improvements in fill rates and mark-outs when using Dynamic M-ELO versus static M-ELO, with the volume-weighted average improvement being aligned with the results expressed in the White Paper. We detected no material variations that might suggest that a particular participant or category of participant (*i.e.*, nature of firm; size of firm) benefitted from Dynamic M-ELO functionality to an extent that was unreasonably disproportionate to the benefits that other participants experienced. Thus, Nasdaq believes the model is objective, is designed to, and does avoid bias and discrimination.⁴¹

The Exchange notes that use of Dynamic M-ELOs and M-ELO+CBs remains voluntary for all market participants. Accordingly, if any market participant feels that the dynamic

Holding Periods are still too long or too short or because competing venues offer more attractive delay mechanisms, then the participants are free to pursue other trading strategies or utilize other trading venues. They need not utilize Dynamic M-ELOs or M-ELO+CBs.

Furthermore, the design of Dynamic-MELO would constitute an “established, non-discretionary” method that is consistent with the definition of an exchange, as set forth in SEC Rule 3b-16.⁴² The Commission stated as follows when it adopted Rule 3b-16:

A system uses established non-discretionary methods either by providing a trading facility or by setting rules governing trading among subscribers. The Commission intends for “established, non-discretionary methods” to include any methods that dictate the terms of trading among the multiple buyers and sellers entering orders into the system. Such methods include those that set procedures or priorities under which open terms of a trade may be determined. For example, traditional exchanges’ rules of priority, parity, and precedence are “established non-discretionary methods,” as are the trading algorithms of electronic systems. Similarly, systems that determine the trading price at some designated future date on the basis of pre-established criteria (such as the weighted average trading price for the security on the specified date in a specified market or markets) are using established, non-discretionary methods.⁴³

Nothing in the Reg. ATS Adopting Release or in any of its illustrative examples suggests that Dynamic M-ELO would constitute an exercise of discretionary behavior. Dynamic M-ELO will handle and execute Orders according to published, pre-determined rules that are disclosed to the public and which provide reasonable notice of how the Order Type will behave.⁴⁴ To the extent that the design of the System

permits variation in the Holding Periods for such Orders, it does so by design. The range of potential variations, the objectives that such variations are intended to achieve, and the factors that determine when such variations may occur are also predetermined and set forth in the Exchange’s Rules or otherwise disclosed to the public. The mere fact that the System may apply different weights over time to the factors it uses to determine whether and by how much to vary a Holding Period does not mean that the System will act with discretion in the same sense that a human being could be said to be exercise independent judgment when deciding whether and how to handle an order.⁴⁵ Even when the System makes decisions about changing the Holding Periods, the System will operate pursuant to a mathematical algorithm from which it cannot deviate—an algorithm that is programmed to achieve pre-defined and pre-disclosed objectives.⁴⁶

⁴⁵ *Cf. id.* at 70851 (explaining that a traditional block trading desk is an example of a system that does not use established, non-discretionary methods because the operators of such desks do not act according to fixed procedures known to their customers, but instead shop orders around for potential counterparties and make their own determinations as to whether and how to execute block orders, including by sometimes deciding to take a proprietary position in part of the block order).

⁴⁶ *See id.* at 80755 (describing an example of a system that would be non-discretionary in nature: “System I permits participants to enter a range of ranked contingent buy and sell orders at which they are willing to trade securities. These orders are matched based on a mathematical algorithm whose priorities are designed to achieve the participants’ objectives. System I does not display orders to any participants. System I is included under Rule 3b-16.”); *see also* Securities Exchange Act Release No. 34-89686 (August 20, 2020), 85 FR 54438, at 54445, n.92 (September 1, 2020) (Order approving SR-IEX-2019-15) (rejecting argument that IEX’s D-Limit order time is an exercise of discretion because “D-Limit orders will not allow IEX to exercise any discretion on any particular order by deviating from the CQI and D-Limit functionality, which is hardcoded in the IEX rulebook.”); Securities Exchange Act Release No. 34-78101 (June 17, 2016), 81 FR 41141, at 41153 (June 17, 2016) (Order approving IEX Form 1 and D-Peg Order Type) (“the Commission does not believe that the hardcoded conditionality of the IEX proposed “discretionary” peg order type provides IEX with actual discretion or the ability to exercise individualized judgment when executing an order. Rather, if IEX’s fixed formula determines the quote to be stable, the discretionary peg order can execute up to the midpoint; if it does not deem the quote to be stable, then it will hold the order to its pegged price. As such, IEX would not exercise discretion over the routing and execution of a resting order”). Nasdaq does not believe that it is necessary to codify its mathematical formula for Dynamic M-ELO in its Rules because Nasdaq has disclosed sufficient information in its Rules and in its filing to inform the public as to the possible and expected behaviors associated with Dynamic M-ELO, as well as a means for the Commission and/or investors to verify whether Dynamic M-ELO is performing appropriately. Much as the Commission does not

⁴⁰ Beyond this grouping of participants, the activity levels of other individual M-ELO participants were so small as to be insignificant. In many cases, these participants entered only a handful of M-ELOs during the study period. As such, the Exchange believes it is reasonable to exclude such participants from its analysis to avoid their data distorting the results.

⁴¹ The Exchange will review its AI model periodically to affirm that it continues to perform in accordance with the Exchange’s rules and has not introduced any harmful bias in favor of or against any participant or category of participants.

⁴² *See* 17 CFR 240.3b-16(a)(2) (“(a) An organization, association, or group of persons shall be considered to constitute, maintain, or provide ‘a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,’ as those terms are used in section 3(a)(1) of the Act, (15 U.S.C. 78c(a)(1)), if such organization, association, or group of persons: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) Uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.”).

⁴³ *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70850 (December 22, 1998).

⁴⁴ *See id.* at 70900 (“an essential indication of the non-discretionary status of rules and procedures is that those rules and procedures are communicated to the systems users” and “[t]hus, participants have an expectation regarding the manner of execution—that is, if an order is entered, it will be executed in accordance with those procedures and not at the discretion of a counterparty or intermediary.”).

The Exchange notes that it will continue to conduct real-time surveillance to monitor the use of M-ELOs and M-ELO+CBs to ensure that such usage remains appropriately tied to the intent of the Order Types. If, as a result of such surveillance, the Exchange determines that the Dynamic M-ELO Holding Periods do not serve their intended purposes, or adversely impact market quality, then the Exchange will seek to make further recalibrations.

Nasdaq does not believe that the design of Dynamic M-ELO lends itself to potential manipulation by a single participant or a small group of participants because the System makes determinations regarding Holding Periods based upon prevailing market-wide conditions for a given symbol, rather than the behaviors of particular participants with respect to that symbol, or the activity of participants in M-ELOs involving that symbol. Manipulation of the System also would be difficult to accomplish given the large number of variables that factor into the System's decisions to change Holding Periods during Change Events, as well as the different weights that apply to each such factor, which as described above, the System may vary over time. Any benefits that a participant might derive from manipulating the duration of Holding Periods would likely be small and outweighed significantly by the difficulty and cost of affecting such manipulation. Nevertheless, the Exchange will surveil for indications of manipulation and act accordingly if it detects such indications.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that this proposal will promote the competitiveness of the Exchange by rendering its M-ELO and M-ELO+CB Order Types more attractive to participants.

The Exchange adopted the M-ELO and M-ELO+CB as pro-competitive measures intended to increase participation on the Exchange by allowing certain market participants that may currently be underserved on

regulated exchanges to compete based on elements other than speed. The proposed change continues to achieve this purpose. With Dynamic M-ELO Holding Periods, both M-ELOs and M-ELO+CBs will afford their users with a level of protection from information leakage and adverse selection that is better from what is achievable at present.⁴⁷ At the same time, the Dynamic Holding Periods will increase opportunities to interact with other like-minded investors with longer time horizons while also lowering the opportunity costs for participants that utilize M-ELOs and M-ELO+CBs, particularly for securities that trade within the "Goldilocks" zone. In sum, the proposed changes will not burden competition, but instead may promote competition for liquidity in M-ELOs and M-ELO+CBs by broadening the circumstances in which market participants may find such Orders to be useful. With the proposed changes, market participants will be more likely to determine that the benefits of entering M-ELOs and M-ELO+CBs outweigh the risks of doing so.

The proposed change will not place a burden on competition among market venues, as any market may adopt an order type that operates similarly to a M-ELO or a M-ELO+CB with Dynamic M-ELO Holding Periods.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

IV. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to adopt Dynamic M-ELO is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁴⁸ In particular, the Commission finds that the proposed

rule change, as modified by Amendment No. 2, is consistent with Sections 6(b)(5) and 6(b)(8) of the Act.⁴⁹ Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.⁵⁰ Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.⁵¹

Nasdaq's Obligation To Sufficiently Explain Its Proposed Rule Change

The burden to demonstrate that a proposed rule change is consistent with the Act and rules and regulations thereunder is on the self-regulatory organization ("SRO") proposing a rule change.⁵² Each proposed SRO rule change must be "accompanied by a concise general statement of the basis and purpose of such proposed rule change."⁵³ As described in more detail below, several commenters argued that the proposal did not provide sufficient information with respect to the operation of Dynamic M-ELO, or that the information provided was not "clear and comprehensible," as required by Form 19b-4. For the reasons articulated below, the Commission believes that Nasdaq has provided clear and comprehensible information on the overall operation of Dynamic M-ELO and the role of the machine-learning model and demonstrated that the proposal is consistent with the Act. Several related comments addressed this issue; these comments and Nasdaq's responses are discussed below, followed by the Commission's analysis.

One commenter stated that the initial filing would establish "a dangerously vague standard for describing how exchange-hosted complex algorithmic

⁴⁷ See White Paper, *supra*.

⁴⁸ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f). One commenter questioned whether Nasdaq's pending patent applications for the systems it will use to operate Dynamic M-ELO imposes an unnecessary or inappropriate burden on competition. See *Letter from R.T. Leuchtkafer*, dated January 21, 2023 ("Leuchtkafer Letter 1"), at 3. The Commission does not believe that the sole fact that Nasdaq has a pending patent application for the technology it has developed to operate the Dynamic M-ELO is indicative that the operation of Dynamic M-ELO on the Exchange would place an inappropriate burden on competition. As explained below, Nasdaq has provided sufficient public disclosure and analysis to explain how Dynamic M-ELO will operate.

⁴⁹ In addition to providing a statutory analysis in its filing, Nasdaq also acknowledges, above in Amendment No. 2, that the systems it will use to implement Dynamic M-ELO, including the Exchange's model development and retraining processes, are SCI systems under Regulation SCI, see 17 CFR 242.1000 *et seq.*, and thus, it will be responsible for compliance with Regulation SCI with respect to Dynamic M-ELO, including having appropriate policies and procedures. See *supra* note 33 and accompanying text.

⁵⁰ 15 U.S.C. 78f(b)(5).

⁵¹ 15 U.S.C. 78f(b)(8).

⁵² See 17 CFR 201.700(b)(3).

⁵³ 15 U.S.C. 78s(b)(1).

require an exchange to codify the source code it uses to effectuate other behaviors or actions that it explains in its Rules, including the behaviors of other complex Order Types, there is no basis to require codification of the Dynamic M-ELO formula in this instance.

order types operate.”⁵⁴ In response to public comment, Nasdaq added more details describing the operation of Dynamic M–ELO to both the filing and public record since this proposed rule change was initially submitted to the Commission, and Nasdaq also provided additional legal analysis to support Dynamic M–ELO’s consistency with the Act. Prior to the filing of Amendment No. 1, a commenter stated that although “Nasdaq shared some of the 142 features of their formula,” Nasdaq should reveal all of these features so that prospective users may evaluate how the model works.⁵⁵ Similarly, another commenter stated that the public cannot provide meaningful comment on the proposal without knowing all categories and parameters of the proposed Dynamic M–ELO.⁵⁶ In its response to these comments, the Exchange, among other things, provided the specific 142 data elements that will be weighed by the machine-learning model as both an appendix to its first letter in response to comments,⁵⁷ and as Exhibit 3B to its Amendment No. 1 filing.

In response to the Exchange’s disclosures in Exhibit 3B of Amendment No. 1, one of these commenters stated that the list of data elements was not “clear and comprehensible” as is required by the Form 19–4, but rather “vague, confusing, and perfunctory.”⁵⁸ This commenter also stated that the disclosed data elements included unexplained terms (e.g., “baseline simulated,” “action simulated,” and “synthetic mark-out”).⁵⁹ In a subsequent comment letter, this commenter reiterated these points; the commenter specified that the commenter’s concern is that Nasdaq’s rule text does not disclose information about its methods for assessing market conditions and that “Nasdaq should carefully detail its methods in its rulebook, just like other exchanges have done, and Nasdaq should also thoroughly disclose its methods in its filing text.”⁶⁰ In its second response to

comments⁶¹ and the revised Exhibit 3b to Amendment No. 2, Nasdaq expanded and “simplified” the explanation of these 142 data elements. The Exchange also added to the proposed rule text a definition of the term “proprietary assessment of market conditions” to explain how the machine-learning model will evaluate those 142 data elements.⁶²

Furthermore, Nasdaq attached, as Exhibit 3A to its proposed rule change, the White Paper written by its AI Core Development Team that explains, among other things, how Dynamic M–ELO’s machine-learning functions were developed and tested. The White Paper includes a general discussion of the type of model implemented in the proposed system, in this case a reinforcement learning model,⁶³ as well as citations to academic research behind the Double Deep Q-Network algorithm that is the basis for the algorithm used in Nasdaq’s model.⁶⁴ The White Paper also describes the ways in which Nasdaq’s implementation of the proposed model differs from the model and training in the academic research, providing both an English summary and a pseudocode description of differences in model training implemented by Nasdaq.⁶⁵

One of the commenters stated that the White Paper is not easily understood by most market participants and that referencing the White Paper in the filing is an “unacceptable substitute” for a “plain English” explanation of the proposal in Form 19b–4.⁶⁶ In response, Nasdaq explained that it drafted the filing to provide a general

language from the Commission’s approval order for the D-Limit order type. *See id.* at 4. The commenter notes the level of detail with regard to how and when the D-Limit order type exercises its discretionary price-sliding that is set forth in the IEX Rulebook. *See id.* at 4; *see also* Themis Letter, *supra* note 54, at 2 (“Another exchange, IEX, operates a smart logic called CQI (Crumbling Quote Indicator) which aims to protect orders from being adversely selected. IEX has published detailed notes on how the CQI is calculated.”). Each proposal must be evaluated based on the specific facts and circumstances before the Commission. In this case, the Commission is only reviewing the proposed operation of Dynamic M–ELO and its machine-learning model. Accordingly, the level of detail provided in the IEX Rulebook for the D-Limit order type and Crumbling Quote Indicator—or the rulebooks for order types on other exchanges—does not determine whether Nasdaq has met its burden in this proposal.

⁶¹ *See* Letter from Brett Kitt, Associate Vice President and Principal Associate General Counsel, Nasdaq, Inc., dated May 18, 2023 at Appendix A (“Nasdaq Second Response to Comments”).

⁶² *See supra* note 25.

⁶³ *See* White Paper Section 3.1.

⁶⁴ *See* White Paper Section 4.1.

⁶⁵ *See* White Paper, Section 7.2.

⁶⁶ *See* Leuchtkafer Letter 2, *supra* note 58, at 3–4; Leuchtkafer Letter 3, *supra* note 60, at 4–5; Letter from R.T. Leuchtkafer, dated August 11, 2023, at 8–10 (“Leuchtkafer Letter 4”).

understanding of Dynamic M–ELO and how it will behave, and the more detailed information and explanation in the White Paper are meant to support the filing.⁶⁷

The Commission agrees with comments and the Exchange that there is an extent to which the proposed changes will introduce an unavoidable degree of uncertainty with respect to the use of these order types. The deep reinforcement learning model that will determine the dynamic holding periods for each symbol for M–ELO and M–ELO+CB orders will be implemented through established, non-discretionary methods,⁶⁸ but it is so complex that its complete details are, for most intents and purposes, not readily intelligible, and it would be immensely difficult for the Exchange or any market participant to precisely predict the holding periods that will be generated by the model for any given symbol at any particular time. Nevertheless, as further discussed below, the Commission believes that the Exchange has provided information sufficient for the Commission and public to understand the design, operation, and limits of the proposed changes to these order types, and the role of the machine-learning model therein.

While the holding periods under the proposal would be dynamic, Nasdaq has precisely articulated both the nature of changes that would be permissible under the proposal, and the limits to those changes. Nasdaq described when changes might occur (every thirty seconds throughout the trading day), the initial default holding period for all symbols (1.25 milliseconds), the permissible increments by which a holding period might change in each symbol (0.25 or 0.50 milliseconds), and the outer bounds of permissible holding period lengths (0.25 milliseconds at the short end, and 2.50 milliseconds at the long end). Nasdaq also described the conditions of “extraordinary instability” in a symbol when these holding periods would not apply, and when the holding periods would be overridden by the proposed “stability protection mechanism” (with a holding period of 12 milliseconds for at least 750 milliseconds). The Commission believes that these details provide sufficient information to understand the range of potential holding periods that may be applied when M–ELO or M–ELO+CB orders are entered or resting on the order book, the changes that may occur, and the limits to those changes.

⁶⁷ *See* Nasdaq Second Response to Comments, *supra* note 61, at 3–5.

⁶⁸ *See infra* notes 91–92 and accompanying text.

⁵⁴ *See* Leuchtkafer Letter 1, *supra* note 48, at 1–2. *See also* Letter from Joseph Saluzzi, Partner, Themis LLC, dated January 25, 2023, at 3 (“Themis Letter”) (questioning whether the complexity of Dynamic M–ELO is necessary).

⁵⁵ *See* Themis Letter, *supra* note 54, at 2.

⁵⁶ *See* Leuchtkafer Letter 1, *supra* note 48, at 1.

⁵⁷ *See* Letter from Brett Kitt, Associate Vice President and Principal Associate General Counsel, Nasdaq, Inc., dated March 9, 2023, at Appendix A (“Nasdaq First Response to Comments”).

⁵⁸ *See* Letter from R.T. Leuchtkafer, dated May 2, 2023, at 8–9 (“Leuchtkafer Letter 2”).

⁵⁹ *See id.*

⁶⁰ *See* Letter from R.T. Leuchtkafer dated May 30, 2023, at 3–5; 8–9 (“Leuchtkafer Letter 3”). This commenter also cites to the rules governing the Crumbling Quote Indicator and D-Limit order type on the Investors Exchange (“IEX”), as well as

Nasdaq has also described the role of the machine-learning model in its proposal. The model will determine whether, by which increment, and in which direction to adjust the holding period for each symbol throughout the trading day.⁶⁹ In its Form 19b-4, White Paper, and response letters, Nasdaq described the goals towards which the model is optimized: reducing mark-outs and increasing fill rates.⁷⁰ Nasdaq's White Paper includes a detailed discussion of model choice, development, and training, including citations to relevant other research.⁷¹ Nasdaq also provided several iterations of a list of data elements that the model will ingest and use, including a glossary defining terms used in the descriptions.⁷² Nasdaq affirmed that in operation during market hours, the data used would be calculated based on intraday market data.⁷³ One version of these lists included Nasdaq's estimates of the tendencies of data elements to affect model outcomes.⁷⁴ Nasdaq's White Paper also included an "explainability study" that assessed both the effects of individual data elements on model performance and the effects of interactions between individual data elements.⁷⁵ Across its filing and incorporated exhibits, aspects of the model's operations and design are described in different formats and with different levels of specificity—for example, the filing and exhibits include "plain English" descriptions, mathematical definitions, and pseudocode. Together, this set of information allows the Commission to understand the type of decision the model will implement, the goals the model aims to achieve, which model type is implemented and how it was developed, the range of data types and data sources used by the model, and

estimates of the manner in which those data may affect model outcomes.

Nasdaq also explains how and when the machine-learning model will be retrained. Nasdaq will retrain the model weekly, outside of market hours. Retraining will incorporate market data obtained during the week from the equity consolidated data feeds and M-ELO order book. A retrained model will only be promoted to production if it improves upon the model objectives compared to the prevailing model.⁷⁶ Furthermore, the Exchange explained that the machine-learning model is consistent in its behavior from day-to-day during periods when it is not undergoing retraining, "such that its decisions when presented with given set of facts and circumstances in a given security on day 1 should be the same as they would be on day 2."⁷⁷ The Exchange also stated in its initial response to comments that "[e]ven after the system undergoes retraining, which will occur on a weekly basis (and not during market hours), system behavior should not change dramatically or in unexpected ways from week-to-week."⁷⁸ As noted above as well, the Exchange also represents that outside of set retraining periods, "the System will operate pursuant to a mathematical algorithm from which it cannot deviate—an algorithm that is programmed to achieve pre-defined and pre-disclosed objectives."⁷⁹ Nasdaq also will publish equity trader alerts when it anticipates that a model update may change mark-outs or fill rate by 10% or more in either direction.⁸⁰ By including this set of information, Nasdaq has provided the Commission and public with information that allows them to understand how frequently the model will be retrained, the data used for retraining, and the criteria that will be used to determine whether to update the

production model based on retraining. This information allows the Commission to understand when the proposed model may change and when it will remain constant, the circumstances under which a change would be implemented, and circumstances under which the public will receive notice of significant changes in the model's anticipated outcomes.

In addition, a commenter stated their belief that the Exchange's proposal for Dynamic M-ELO would result in the exercise of discretion by a national securities exchange because the machine-learning model's decisions would vary over time based on the following: (1) varying parameter values; and (2) results of retraining cycles.⁸¹ The commenter stated that by making it possible for Dynamic M-ELO to behave differently when confronted by the same market conditions before and after the model is retrained, Nasdaq's model would be exercising discretion that is more akin to a broker than an exchange.⁸²

The commenter claimed that Dynamic M-ELO would operate outside of established non-discretionary methods, which require "fully disclosed procedures operating in a strictly linear, invariant, and deterministic fashion."⁸³ Additionally, the commenter stated that Nasdaq would be exercising discretion with Dynamic M-ELO to alter a participant's material order terms.⁸⁴ The commenter claimed that Nasdaq would be using undisclosed data such as the

⁶⁹ See Leuchtkafer Letter 1, *supra* note 48, at 2; Leuchtkafer Letter 2, *supra* note 58, at 4–6; Leuchtkafer Letter 3, *supra* note 60, at 5–7; Leuchtkafer Letter 4, *supra* note 66, at 4–8.

⁸² See Leuchtkafer Letter 1, *supra* note 48, at 2. See also Leuchtkafer Letter 3, *supra* note 60, at 5–7. For example, the commenter believes that Dynamic M-ELO will "exercise individualized judgment" such that it can set a different time-in-force for the very same order presented in the very same market conditions on, for example, August 21 than it set on May 15, depending on the system's undisclosed individualized judgments of market conditions and participant behavior from even days or weeks in the past. See Leuchtkafer Letter 4, *supra* note 66, at 6.

⁸³ See Leuchtkafer Letter 2, *supra* note 58, at 5–6. See also Leuchtkafer Letter 3, *supra* note 60, at 5–7. See also Leuchtkafer Letter 4, *supra* note 66, at 6–9 ("... Nasdaq's rulebook won't set out the 'totality of the discretionary feature' (I believe it can't, because the totality changes week-to-week and even minute-to-minute) and it won't define the 'hardcoded conditionality' of its feature (again, I believe it can't), and a market participant won't be able to 'recreate on its own' what Dynamic M-ELO has done (participants can't—it's not even clear anyone will be able to, as discussed below). . . . Dynamic M-ELO departs from decades of this progress. Its behavior will not be deterministic or invariant over time, and purposefully so.").

⁸⁴ See Leuchtkafer Letter 2, *supra* note 58, at 8. See also Leuchtkafer Letter 3, *supra* note 60, at 5–7.

⁶⁹ See *supra* notes 16–24 and accompanying text.

⁷⁰ See, e.g., Form 19b-4 at 9, White Paper Section 5, and Nasdaq First Response to Comments at 2. In its White Paper, Nasdaq provides mathematical definitions of fill rate for a period of time and mark-out by trade (White Paper at 5, Equations 1 and 2), as well as of the assessment made by the agent in the model's reinforcement learning process (White Paper at 11, Equation 3).

⁷¹ See White Paper Sections 3–5.

⁷² See Exhibit 3B. As described below, these data elements are also those used in training and retraining the model.

⁷³ See Letter from Brett Kitt, Associate Vice President and Principal Associate General Counsel, Nasdaq, Inc., dated September 6, 2023 ("Nasdaq Third Response to Comments").

⁷⁴ Nasdaq affirmed that, while this information was not included in all versions of the list of data elements, it remains accurate and valid. See *id.* at 3.

⁷⁵ See White Paper Section 5.3.

⁷⁶ For example, Nasdaq affirmatively states that if "a retrained model would be worse than the existing model in achieving its objectives, then the System will continue to use the existing model and discard the retrained model." See Section III.A.1., *supra*.

⁷⁷ See Nasdaq First Response to Comments, *supra* note 57, at 2–3. See also *supra* note 30.

⁷⁸ See Nasdaq First Response to Comments, *supra* note 57, at 2–3. A commenter also noted that it was initially unclear when and how frequently the machine-learning model would retrain, stating that the White Paper set forth an analysis based on daily retraining, but the rule filing proposes weekly retraining. See Leuchtkafer Letter 2, *supra* note 58, at 4; Leuchtkafer Letter 3, *supra* note 60, at 2; Leuchtkafer Letter 4, *supra* note 66, at 9. In Amendment No. 2, the Exchange affirmatively represents that "the performance statistics for Dynamic M-ELO cited herein and in the White Paper are based upon data derived from weekly, not daily retrains." See *supra* note 38.

⁷⁹ See *supra* note 46 and accompanying text.

⁸⁰ See, e.g., Amendment No. 2 at 19–20.

buyer and seller counts and recent trade sizes.⁸⁵ Further, the commenter stated:

that (a) by determining the universe of data the system consumes, (b) by programming how the system thinks, (c) by controlling and supplying the information with which it thinks, and (d) by setting the goals and programming the nature and extent of its actions, and when it does all this to determine (e) when and in which prescribed intervals to set an ever variable time-in-force term for an order, a term which (f) dictates when to expose an order to the market to find contra-side interest, then without question Nasdaq is exercising control, judgment, and discretion over its customer orders.

In Amendment No. 1, Nasdaq added language to address these concerns.⁸⁶ Among other things, Nasdaq stated that to the extent that the design of Dynamic M–ELO permits variation in the Holding Periods for such orders, it does so by design, and the “mere fact that the System may apply different weights over time to the factors it uses to determine whether and by how much to vary a Holding Period does not mean that the System will act with discretion in the same sense that a human being could be said to be exercise independent judgment when deciding whether and how to handle an order.”⁸⁷ Additionally, Nasdaq stated the following in its second response to comments:

It is also worth noting that presently, exchanges like Nasdaq already employ non-linear, non-deterministic functionalities, like the randomized timers it uses to resolve certain unavoidable race conditions that arise in the order handling process. Nasdaq employs these functionalities with the knowledge of the SEC, and without any suggestion that they somehow transform Nasdaq into a broker.⁸⁸

Furthermore, as noted above, the Exchange represents that outside of set retraining periods, “the System will operate pursuant to a mathematical algorithm from which it cannot deviate—an algorithm that is programmed to achieve pre-defined and pre-disclosed objectives.”⁸⁹ The Exchange explains that outside of the set retraining periods “the System will behave predictably from day to day, such that its decisions when presented with given set of facts and circumstances in a given security on day

1 should be the same as they would be on day 2.”⁹⁰

Based on Nasdaq’s representations described above, Dynamic M–ELO would operate pursuant to pre-determined, programmed procedures that would dictate order interaction and the terms for trading for each Dynamic M–ELO order entered on the Nasdaq trading facility. While the Exchange’s procedures include conditions that, if satisfied under certain circumstances, might result in different outcomes for different M–ELO orders, such conditions and circumstances, if pre-determined, pre-defined, and programmed into the Exchange’s trading facility, would be considered established and not discretionary. For example, according to the Exchange, Dynamic M–ELO may apply different pre-determined weights over time to pre-determined factors it uses to determine whether and by how much to vary a Holding Period.⁹¹ In such an event, Dynamic M–ELO will operate pursuant to pre-determined procedures and programmed mathematical algorithm from which it cannot deviate to “achieve pre-defined and pre-disclosed objectives.”⁹² Further, the procedures governing Dynamic M–ELO and use of M–ELO orders will be established before the beginning of each trading day. For example, Dynamic M–ELO will use preset methods to evaluate and weigh specific data elements to determine the dynamic holding periods. Such pre-set methods will be established during the prior retraining period, and outside regular trading hours, and will not vary intra-day until adjusted at the next retraining period.

Given the pre-determined, programmed procedures and rules that Nasdaq has proposed to dictate trading for Dynamic M–ELO, the Commission does not believe that Dynamic M–ELO is designed to provide Nasdaq with judgement and flexibility, and therefore, discretion over the handling or execution of a M–ELO order entered on the Exchange.

Unfair Discrimination

Section 6(b)(5) of the Act requires that the rules of a national securities exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In several letters, one commenter stated that Nasdaq inadequately explains how it will monitor and, if necessary, adjust Dynamic M–ELO to ensure no unfair

discrimination.⁹³ Initially, this commenter emphasized what they perceived to be silence on the part of Nasdaq with regard to whether Dynamic M–ELO will discriminate among categories of participant types.⁹⁴ In its response to these comments, Nasdaq initially added a new representation to the filing in Amendment No. 1, stating that that Dynamic M–ELO is not designed to further the performance of any participant or any category of participant, but instead has twin objectives—the absolute values of mark-outs and fill rates. In Amendment No. 2, Nasdaq expanded on this representation by adding the following:

Furthermore, Nasdaq performed internal tests of its AI model to detect indications of harmful bias in its performance results, and such tests concluded that no such indications exist. That is, the Exchange reviewed the impact on fill rates and mark-outs of Dynamic M–ELO, as compared to the “static” M–ELO, for those firms that accounted for more than 95% of M–ELO activity on the Exchange during Q1 2022 The Exchange analyzed results both in an absolute and a relative sense. Testing revealed that all participants experienced at least some improvements in fill rates and mark-outs when using Dynamic M–ELO versus static M–ELO, with the volume-weighted average improvement being aligned with the results expressed in the White Paper. We detected no material variations that might suggest that a particular participant or category of participant (*i.e.*, nature of firm; size of firm) benefitted from Dynamic M–ELO functionality to an extent that was unreasonably disproportionate to the benefits that other participants experienced. Thus, Nasdaq believes the model is objective, is designed to, and does avoid bias and discrimination.

In Amendment No. 2, Nasdaq also affirmed that it will periodically review its model to ensure that it continues to perform in accordance with the Exchange’s rules and that it has not introduced any harmful bias in favor of or against any participant or class of participants.⁹⁵

In response to the above, the commenter submitted a fourth comment letter, in which they questioned the approach Nasdaq took to demonstrate that there is not bias against any one

⁸⁵ See Leuchtkafer Letter 2, *supra* note 58, at 8. See also Leuchtkafer Letter 3, *supra* note 60, at 5–7; Leuchtkafer Letter 4, *supra* note 66, at 5–7.

⁸⁶ See *supra* notes 42–46.

⁸⁷ See *supra* note 45 and accompanying text.

⁸⁸ See Nasdaq Second Response to Comments, *supra* note 61, at 5–9. See also Nasdaq First Response to Comments, *supra* note 57, at 5–7.

⁸⁹ See *supra* note 46 and accompanying text.

⁹⁰ See *supra* note 29.

⁹¹ See *supra* note 45 and accompanying text.

⁹² See *supra* note 46 and accompanying text.

⁹³ See Leuchtkafer Letter 3, *supra* note 60, at 7–8; Leuchtkafer Letter 2, *supra* note 58, at 5; Leuchtkafer Letter 1, *supra* note 48, at 3. Nasdaq’s White Paper includes a “firm-level analysis” that “tried to identify patterns and trends that could potentially signify a systematic bias towards specific firms.” White Paper at 24. This analysis concluded that “Dynamic M–ELO will not result in systematic-biased execution towards any one firm.” *Id.* at 26.

⁹⁴ See Leuchtkafer Letter 3, *supra* note 60, at 7–8.

⁹⁵ See Amendment No. 2 at fn. 34.

participant or class of participants.⁹⁶ The commenter, among other things, expressed concern about Nasdaq conducting its analysis using data for firms that accounted for 95% of M–ELO activity during Q1 of 2022 rather than all M–ELO activity. The commenter states that Nasdaq did not describe how it determined the 5% of activity during that period to exclude from its analysis.⁹⁷ For example, the commenter states that it is not clear whether Nasdaq excluded firms with large orders and trades, and the commenter opines that discarding any data could exclude activity that has qualitative or quantitative differences from the rest.⁹⁸

In response to this comment, Nasdaq represented that it conducted a supplemental analysis of the initially-excluded data—which were the activity of the least-active M–ELO firms from the control period of its initial analysis—to confirm whether its initial conclusions held for those participants.⁹⁹ Nasdaq explains that the individual variations among the previously excluded participants was higher than that for the original batch of data, but that, based on simulated data, each of these participants would have experienced the same or better fill rates during the testing period if they had utilized Dynamic M–ELO.¹⁰⁰ Based on this supplemental data analysis, Nasdaq concluded that there is no apparent biases for the Dynamic M–ELO, even among the least active M–ELO participants.¹⁰¹

The Commission concludes that Nasdaq has adequately demonstrated that the proposal is not designed to permit unfair discrimination consistent with Section 6(b)(5) of the Act. Through the White Paper, amendments, and response letters, Nasdaq has demonstrated that it has analyzed the anticipated or simulated effects of the proposed change on all current M–ELO users, and that this work did not indicate that particular firms or classes of firms are anticipated to unfairly

benefit from or be harmed by the proposed Dynamic M–ELO functionality.

Prevention of Fraudulent and Manipulative Acts and Practices, Just and Equitable Principles of Trade, and the Protection of Investors and the Public Interest

Section 6(b)(5) of the Act also requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. In Amendment No. 2, Nasdaq addressed whether the Dynamic M–ELO is designed to prevent fraudulent and manipulative acts and practices. Nasdaq states that the design of Dynamic M–ELO does not lend itself to potential manipulation by a single participant or a small group of participants because the machine-learning model makes determinations regarding Holding Periods based upon prevailing market-wide conditions for a given symbol, rather than the behaviors of particular participants with respect to that symbol, or the activity of participants in M–ELOs involving that symbol. Nasdaq further states that manipulation of the machine-learning model would be difficult to accomplish given the large number of variables that factor into the machine-learning model's decisions to change Holding Periods during Change Events, as well as the different weights that apply to each such factor, which as described above, may vary over time. Furthermore, Nasdaq states that any benefits that a participant might derive from manipulating the duration of Holding Periods would likely be small and outweighed significantly by the difficulty and cost of effecting such manipulation.

The Exchange, in Amendment No. 2, also sets forth representations regarding how it will surveil its market after Dynamic M–ELO is implemented. First, Nasdaq represents that it will review the machine-learning functionality and operation periodically to affirm that it continues to perform in accordance with the Exchange's rules and has not introduced any harmful bias in favor of or against any participant or category of participants.¹⁰² Nasdaq also represents above that it will surveil for indications of manipulation and act accordingly if it detects such indications.

The Commission finds that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices consistent with

Section 6(b)(5) of the Act. The Commission agrees that aspects of the Dynamic M–ELO design reduce opportunities for manipulation or are likely to make manipulation costly or difficult. The model's operation depends on 142 data elements, which are each likely to have effects on model outcomes of differing magnitudes and in different directions. Many of these data elements are also based on market-wide data, in some cases spanning periods of days,¹⁰³ which are likely themselves difficult for market participants to manipulate. Given these design features, it appears likely that manipulating the duration of Dynamic M–ELO holding periods in any given symbol or group of symbols would be an extremely complex undertaking. In light of this complexity, and the size of M–ELO activity relative to the market for NMS stocks,¹⁰⁴ Nasdaq's assertion that the potential benefits of manipulating the dynamic holding periods for these order types would be outweighed by the cost and complexity of manipulation also appears reasonable. Nasdaq has also represented that it intends to surveil the proposed order types for manipulation. This ongoing surveillance, to ensure the appropriate use of Dynamic M–ELO by Exchange Members and behavior by the machine-learning model, is important to the successful implementation of Dynamic M–ELO and appears appropriately tailored to the accomplish the intent of the M–ELO and M–ELO+CB order types.

Furthermore, the Commission finds that overall structure of Dynamic M–ELO—particularly, the static numerical constraints set forth in the proposed rule text—is designed in general, to protect investors and the public interest and promote just and equitable principles of trade pursuant to Section 6(b)(5) of the Act. As described above, the model will continuously engage in dynamic analysis of current market conditions during trading hours, and outside of market hours, it will retrain with the goal of improving the overall performance of Dynamic M–ELO. These dynamic aspects of the proposal,

¹⁰³ See, e.g., Exhibit 3b.

¹⁰⁴ According to the “M–ELO Monthly Report” published by Nasdaq for July 2023 (available at: <https://www.nasdaq.com/docs/M-ELO-Monthly-Report> (accessed September 2, 2023)), the average daily notional volume executed in M–ELO was \$624,556,748. The average daily notional volume executed in July 2023 across the market for NMS stocks was about \$523,769,246,196. See, e.g., Cboe, Historical Market Volume Data, available at: https://www.cboe.com/us/equities/market_statistics/historical_market_volume/. The average daily notional volume in M–ELO for that month was approximately 0.12% (just over one-tenth of one percent) of the average daily notional volume across the entire NMS stock market.

⁹⁶ See Leuchtkafer Letter 4, *supra* note 66, at 1–4.

⁹⁷ See *id.* at 2–3 (“It seems Nasdaq trimmed its data before analyzing it for bias and constrained its analysis to ‘those firms that accounted for more than 95% of M–ELO activity on the Exchange during Q1 2022.’ (I assume Nasdaq used the same data defined in the Filing as the ‘Training Period’ for its analysis. Nasdaq doesn’t say so, however.) Nasdaq doesn’t describe the kind of M–ELO ‘activity’ it filtered the data for, and specifically whether it filtered on order or trade counts or order or trade volume or some combination of two or more of these categories, or on some other factor, before removing firms from its analysis.”)

⁹⁸ See *id.* at 2–3.

⁹⁹ See *id.* at 5–6.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *supra* note 41.

however, are constrained by the static numerical thresholds set forth in the proposed rule text. For example, the initial Holding Periods for each trading day will be 1.25 milliseconds, the overall range for any Holding Period must be between 0.25 and 2.50 milliseconds during normal market conditions, and the Holding Period can only change by either 0.25 or 0.50 milliseconds at each Change Event during normal market conditions. Regardless of how the model analyzes the current market or changes the weighting of the data elements as a result of its retraining, Dynamic M-ELO cannot operate outside of the static numerical ranges and limitations or minimums set forth in the rule text. As such, the Commission finds that Nasdaq has designed Dynamic M-ELO to operate in a manner that in general protects investors and the public interest and promotes just and equitable principles of trade in accordance with Section 6(b)(5) of the Act.

Compliance With SRO Recordkeeping and Reporting Obligations

One commenter queried whether Nasdaq could maintain an adequate audit trail given the potential for frequently shifting Holding Periods for Dynamic M-ELO.¹⁰⁵ In response, Nasdaq states that it will retain copies of each iteration of its system as part of its books and records and will disclose publicly statistics relating to Dynamic M-ELO performance.¹⁰⁶ Nasdaq additionally represented that it will publish weekly and monthly Dynamic M-ELO performance statistics, which would include the weekly numbers of shares and trades in M-ELOs by symbol, weekly aggregated M-ELO share and trade data, and monthly aggregated block data, on Nasdaqtrader.com.¹⁰⁷ Nasdaq also indicated it would add statistics to its existing M-ELO Monthly Report, which discloses quote stability by time horizon, about how frequently, on average, its system changes Holding Period durations for the top decile, median, and bottom decile of symbols, as measured by monthly M-ELO and M-ELO+CB trading volumes.¹⁰⁸

Nasdaq also added a representation to the filing, addressing how it would comply with its recordkeeping obligations.¹⁰⁹ Nasdaq states that it will retain copies of each historical iteration of its models as part of its books and

records, and make them available to the Commission upon request, should it wish to examine them to understand how the model changes over time.¹¹⁰ Nasdaq also states that it will publish an equity trader alert in advance of deploying a retrained version of Dynamic M-ELO when Nasdaq anticipates the retrained version will produce results that differ materially from the prior version.¹¹¹ Based on these representations, the Commission finds that Nasdaq has met its burden to demonstrate that it will comply with all relevant exchange recordkeeping requirements and obligations when it implements Dynamic M-ELO. In addition, the Commission notes that Nasdaq must comply with its reporting obligations under Rule 613 of Regulation NMS¹¹² and the National Market System Plan Governing the Consolidated Audited Trail (“CAT NMS Plan”)¹¹³ with respect to Dynamic M-ELO, which requires it to record and electronically report to the central repository the material terms of each order and each reportable event.¹¹⁴

Nasdaq’s Obligation To File Proposed Rule Changes Relating to Dynamic M-ELO

Prior to the filing of Amendment No. 1, a commenter stated that it was unclear what types of changes to the model would lead Nasdaq to seek approval from the Commission via an SRO rule filing.¹¹⁵ As explained above,¹¹⁶ Nasdaq represents that it will not modify the underlying structure of Dynamic M-ELO without first obtaining the Commission’s approval to do so, including modifications to the data elements the model considers in making decisions about Holding Period durations, the conditions under which the model may adjust the duration of Holding Periods, the frequency with which the model may adjust the Holding Periods, the range of Holding Period durations available to M-ELOs and M-ELO+CBs, the increments by which Holding Periods may change at any given Change Event, and the procedures for triggering, maintaining, and ending 12 millisecond Holding Periods during times of extraordinary instability. In contrast, the Exchange

states that it will not seek Commission approval prior to retraining the model to adjust the weighting it applies to those data elements pursuant to the weekly retraining process.

Section 19(b)(1) of the Act¹¹⁷ and Rule 19b–4 thereunder¹¹⁸ require an SRO to file a proposed rule change with the Commission whenever it seeks any proposed change in, addition to, or deletion from the rules governing the SRO and its members’ activities on the SRO. As discussed above, the proposal sets forth the specific data elements that Dynamic M-ELO will use during the trading day. Furthermore, the proposed rule change sets forth when the machine-learning model will retrain and the extent to which the retraining can and cannot cause the machine-learning model to update Dynamic M-ELO’s operation during subsequent trading days.¹¹⁹ In addition, the proposal sets forth the operation of Dynamic M-ELO, such as the potential range for a Holding Period, how often Dynamic M-ELO reevaluates market conditions for a given security to adjust a Holding Period, and the increment by which a Holding Period may be changed. Nasdaq represents that it will not change any of these aspects of the proposal or any other function of Dynamic M-ELO without first filing a proposed rule change.¹²⁰ Nasdaq does, however, state that it would not file a proposed rule change in connection with the operation of the machine-learning model’s weekly retraining and the results of that process.

Based on the foregoing, the Commission believes that Nasdaq has adequately responded to the commenter’s concern. Nasdaq will need to file a proposed rule to make any changes, additions, or deletions to the operation of Dynamic M-ELO as approved herein. Nasdaq has delineated when it would file a proposed rule change to alter the operation of Dynamic M-ELO, and when the machine-learning model would retrain and adjust the weighting it applies to the data elements without it filing a proposed rule change. Specifically, Nasdaq’s proposed rule change and rule text reflect the 142 data elements Dynamic M-ELO will consider when determining the Holding Period for a security and the goals Nasdaq will consider when weighing those data elements (*i.e.*, reducing mark-outs and increasing fill rates) but does not set forth the relative weighting of each those individual data elements. Though

¹⁰⁵ See Leuchtkafer Letter 1, *supra* note 48, at 1.

¹⁰⁶ See Nasdaq First Response to Comments, *supra* note 57, at 3.

¹⁰⁷ See Section III.A.1., *supra*.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See 17 CFR 242.613.

¹¹³ The CAT NMS Plan was approved by the Commission, as modified, on November 15, 2016. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

¹¹⁴ See 17 CFR 242.613(c)(7).

¹¹⁵ See Leuchtkafer Letter 1, *supra* note 48, at 2.

¹¹⁶ See Section II.A.1., *supra*.

¹¹⁷ 15 U.S.C. 78s(b)(1).

¹¹⁸ 17 CFR 240.19b–4.

¹¹⁹ See Section III.A.1., *supra*.

¹²⁰ See *supra* note 30 and accompanying text.

the structure of the proposal does not disclose of the exact weighting for each of the 142 data elements, it does set forth the two goals Nasdaq will consider when weighing those data elements initially and during each weekly retraining, which provides information as to how those 142 factors will be used in determining the Holding Period for a security. Based on how the proposed rule sets forth the goals that will govern each retraining, the Commission believes that Nasdaq's delineation of when it would and would not file a proposed rule change to alter the operation of Dynamic M-ELO is consistent with Nasdaq's rule filing obligation. The Commission agrees that the weekly retraining to optimize the weighting of the 142 data elements considered by Dynamic M-ELO to best achieve those goals within the rule's parameters would not necessitate the filing of a proposed rule change with the Commission because those adjustments would be reasonably and fairly implied by the proposed rule. However, to the extent Nasdaq seeks to change, add to, or delete from the rule's construct in connection with the weekly retraining, it would first be required to file a proposed rule change with the Commission.

V. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2022-079 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-NASDAQ-2022-079. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR-NASDAQ-2022-079, and should be submitted on or before October 4, 2023.

VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change prior to the 30th day after the date of publication of Amendment No. 2 in the **Federal Register**. Amendment No. 2 does not include any material changes to the operation of the proposed Dynamic M-ELO and its machine-learning model. In Amendment No. 2, the Exchange: (1) adds the defined term "proprietary assessment of market conditions" to the proposed rule text, which consolidates certain details and explanations about how the machine-learning model would operate from prior versions into a single defined term; (2) revises the list of factors provided in Exhibit 3b to include expanded and "simplified" explanations of the terminology used therein; (3) adds a representation that the systems used to operate Dynamic M-ELO and machine-learning model are "SCI Systems" and thus subject to compliance with Regulation SCI; and (4) expands the legal analysis to address comments regarding unfair discrimination and the exercise of impermissible discretion by the Exchange.

The Commission finds that Amendment No. 2 raises no novel regulatory issues that have not previously been subject to comment and is reasonably designed to prevent fraudulent and manipulative acts and

practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not be unfairly discriminatory, or impose an unnecessary or inappropriate burden on competition. Amendment No. 2 does not alter the proposed operation or any material features of Dynamic M-ELO, which operation and features have been subject to two rounds of public comment. In response to public comment, the revisions to the proposal contained within Amendment No. 2 provide additional clarification and details regarding how Dynamic M-ELO and the machine-learning model will operate, as well as additional legal analysis to support the Exchange's position that the proposal is consistent with the Act. Accordingly, pursuant to Section 19(b)(2) of the Act,¹²¹ the Commission finds good cause to approve the proposed rule change on an accelerated basis prior to the 30th day after publication of notice of the filing of Amendment No. 2 in the **Federal Register**.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹²² that the proposed rule change (SR-NASDAQ-2022-079), as modified by Amendment No. 2, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²³

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-19728 Filed 9-12-23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98320; File No. SR-PHLX-2023-41]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 3, Section 13 Concerning PIXL

September 7, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 30, 2023, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission

¹²¹ 15 U.S.C. 78s(b)(2).

¹²² 15 U.S.C. 78s(b)(2).

¹²³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Rules at Options 3, Section 13, Price Improvement XL (“PIXL”).

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx proposes to amend Options 3, Section 13, Price Improvement XL (“PIXL”), to harmonize its price improvement rule text regarding entry checks in Options 3, Section 13(a)(1) through (3) to mirror the rule text of Nasdaq GEMX, LLC’s (“GEMX”), Nasdaq MRX, LLC’s (“MRX”), and Nasdaq ISE, LLC’s (“ISE”) PIM, and BX’s PRISM, without changing the substantive operations of these price improvement auctions. The Exchange proposes to amend Options 3, Section 13(a)(1) through (3) to harmonize the language, to the extent possible, with other Nasdaq affiliated markets. The harmonization will allow market participants to compare Phlx’s PIXL entry checks with similar mechanisms on Nasdaq affiliated markets.

The Exchange also proposes to make two technical amendments to Options 4A at Section 6, Position Limits, and Section 12, Terms of Index Options Contracts. The Exchange also proposes additional changes described below.

PIXL Entry Checks

Phlx proposes to add “a price that is” to the end of Options 3, Section 13(a)(1) and add new subparagraphs (A) and (B) to distinguish opposite and same side checks for a PIXL Order for less than 50 options contracts.³ The opposite side check for a PIXL Order for less than 50 options contracts is currently specified in the current rule text which is being relocated to Options 3, Section 13(a)(1)(A). The same side check for a PIXL Order for less than 50 options contracts currently does not specify the NBBO check. Today, if the PIXL Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01, the Initiating Member must stop the entire PIXL Order at a price that is on the same side of the market as the PIXL Order, equal to or better than the NBBO⁴ and better than any Limit Order on the Limit Order Book. This language represents current System functionality. Additionally, Phlx proposes to add more detail to describe the current System functionality. If the PIXL Order is for a Non-Public Customer, the PIXL Order must also be better than any quote on the same side of the market as the PIXL Order. Today, the System will check if the PIXL Order is better than any quote on the same side of the market as the PIXL Order if the PIXL Order is for a Non-Public Customer. The addition of this detail within Options 3, Section 13(a)(1)(B) will bring transparency to the current System checks for a PIXL Order for less than 50 options contracts.

Phlx proposes to amend Options 3, Section 13(a)(2) to add a “:” to the end of (a)(2) and add new subparagraphs (A) and (B) which distinguish the opposite side and same side checks if the PIXL Order is for the account of a Public Customer and such order is for 50 option contracts or more. The opposite side check for a PIXL Order for the account of a Public Customer for 50 option contracts or more is currently specified in the current rule text, which is being relocated to Options 3, Section 13(a)(2)(A). The same side check for a PIXL Order for the account of a Public Customer for 50 option contracts or more currently does not specify the manner in which the PIXL Order must

improve on the same side or the NBBO check. The Exchange proposes to amend the same side check in Options 3, Section 13(a)(2)(B) to state that if the PIXL Order is for the account of a Public Customer and such order is for 50 option contracts or more, or if the difference between the NBBO is greater than \$0.01, the Initiating Member must stop the entire PIXL Order at a price that is, on the same side of the market as the PIXL Order, (1) at least \$0.01 better than any Limit Order on the Limit Order book; (2) at or better than the PIXL Order’s limit price (if the Order is a Limit Order); and equal to or better than the NBBO. This rule text represents current System functionality. This new rule text makes clear the various same side entry checks that are performed by the current System.

Phlx proposes to amend Options 3, Section 13(a)(3) to add “:” to the end of (a)(3) and add new subparagraphs (A) and (B) which distinguish the opposite side and same side checks for a PIXL Order for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more. The Exchange currently does not specify the opposite side check in the case whether the PIXL Order is for an account of a broker dealer or any other person that is not a Public Customer and the order is for 50 contracts or more. The Exchange proposes to note the current entry check performed by the System by amending the language in Options 3, Section 13(a)(3)(A) to provide, if the PIXL Order is for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more, or if the difference between the NBBO is greater than \$0.01, the Initiating Member must stop the entire PIXL Order at a price that is: (A) equal to or better than the NBBO and the internal market PBBO (the “Reference BBO”) on the opposite side of the market from the PIXL Order.⁵ This language represents current System functionality. Phlx notes that the Reference BBO was defined in Options 3, Section 13(a)(3)(A). The Exchange proposes to amend the same side check in the case whether the PIXL Order is for an account of a broker dealer or any other person that is not a Public Customer and the order is for 50 contracts or more. The Exchange proposes to state if the PIXL Order is for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for

³ The proposed language below in Options 3, Section 13(a)(1) through (3) excludes Complex Orders which are described in Options 3, Section 13(a)(4).

⁴ For example, if the market is 0.98 bid and 0.99 offer, a Public Customer PRISM Order to buy for less than 50 contracts must be stopped at 0.98 cents in this scenario to be accepted into a PRISM Auction, provided there is no resting order or quote on the BX order book at 0.98 in which case the PRISM Order would be rejected.

⁵ The Exchange also proposes to amend Options 3, Section 13(a)(3)(B) to re-number current (A) and (B).

50 option contracts or more, or if the difference between the NBBO is greater than \$0.01, the Initiating Member must stop the entire PIXL Order at a price that is on the same side of the market as the PIXL Order, the better of: (1) the Reference BBO price improved by at least \$0.01, (2) the PIXL Order's limit price (if the order is a Limit Order), or (3) equal to or better than the NBBO. The Exchange is removing the clause in current Options 3, Section 13(a)(3)(2) which the Exchange believes is confusing as current Options 3, Section 13(a)(3)(1) notes the Reference BBO must be improved by at least \$0.01. Also, the NBBO entry check is being relocated to new subparagraph (a)(3)(B)(3).

Finally, the Exchange is making a technical amendment to Options 3, Section 13(a)(4)(A) to remove a semicolon and replace it with a comma.

The Exchange believes that the proposed amendments will bring greater clarity to the current System functionality as the various System checks are noted for each side of the PIXL Order. Further, the NBBO check is specifically noted as this check on the same side check ensures the order does not trade-through. The Exchange is not substantively amending the current System functionality.

Auction Process

The Exchange proposes a technical amendment to Options 3, Section 13(b)(4) to remove the "an" at the beginning of the paragraph as this is unnecessary. Next, the Exchange proposes to replace references to "Limit Order," "order" and "orders" within Options 3, Section 13(b)(4) with the word "interest" because an order or quote on the order book may interact with a PIXL Order. This represents current System functionality.

Finally, the Exchange proposes to amend Options 3, Section 13(b)(6) to remove the term "then-existing" from the paragraph. The phrase is not necessary as the clause "cPBBO at the time of the conclusion of the Auction" makes clear which cPBBO will be referenced.

Technical Amendments

The Exchange proposes to make two technical amendments within Options 4A, Options Index Rules. The Exchange proposes to renumber Options 4A, Section 6(a)(iv) to Options 4A, Section 6(a)(ii). The Exchange also proposes to re-letter Options 4A, Section 12(a)(2)(H), (I) and (J), respectively, as Options 4A, Section 12(a)(2)(G), (H) and (I).

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,⁶ in general, and furthers the objectives of section 6(b)(5) of the Act,⁷ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

PIXL Entry Checks

Phlx's proposal to amend Options 3, Section 13(a)(1)–(3) to harmonize the language within the PIXL entry checks with language within GEMX's PIM, ISE's PIM, MRX's PIM and BX's PRISM, without changing the substantive operations of these price improvement auctions, is consistent with the Act and the protection of investors and the general public because by utilizing similar language, market participants will be able to compare Phlx's PIXL entry checks with similar mechanisms on Nasdaq affiliated markets.

Amending Options 3, Section 13(a)(1) and adding new subparagraphs (A) and (B) to distinguish opposite and same side checks for a PIXL Order for less than 50 options contracts and specifying the same side NBBO check is consistent with the Act and the protection of investors and the general public because it will add more detail to describe the current System functionality. The NBBO check is always relevant in the same side check to avoid a trade-through. Specifying that if the PIXL Order is for a Non-Public Customer, the PIXL Order must also be better than any quote on the same side of the market as the PIXL Order is consistent with the Act so that the PIXL Order improves the order book and provides a meaningful opportunity for price improvement. Further, the addition of this detail within Options 3, Section 13(a)(1)(B) will bring transparency to the current System checks for a PIXL Order for less than 50 options contracts.

Amending Options 3, Section 13(a)(2) to add new subparagraphs (A) and (B) to distinguish the opposite side and same side checks if the PIXL Order is for the account of a Public Customer and such order is for 50 option contracts or more, and specifying the manner in which the PIXL Order must improve on the same side or the NBBO check is consistent with the Act and the protection of investors and the general public. The Exchange currently requires, if the PIXL Order is for the

account of a Public Customer and such order is for 50 option contracts or more, that the PIXL Order must be at or better than the PIXL Order's limit price and it must also not trade-through the order book. The eligibility requirements if the PIXL Order is for the account of a Public Customer and such order is for 50 option contracts or more should provide a meaningful opportunity for price improvement, and thereby benefit investors and others in a manner that is consistent with the Act.

Amending Options 3, Section 13(a)(3) to add new subparagraphs (A) and (B) to distinguish the opposite side and same side checks for a PIXL Order for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more and specifying the opposite side check and same side NBBO check is consistent with the Act and the protection of investors and the general public. The opposite side check must be equal to or better than the NBBO and any non-displayed order on the Exchange's order book to avoid a trade-through. Also, the NBBO check is always relevant in the same side check to avoid a trade-through. The eligibility requirements if the PIXL Order is for the account of a broker dealer or any other person or entity that is not a Public Customer and such order is for 50 option contracts or more should provide a meaningful opportunity for price improvement, and thereby benefit investors and others in a manner that is consistent with the Act.

The Exchange believes that the proposed amendments will bring greater clarity to the current System functionality as the various System checks are noted for each side of the PIXL Order. Further, the NBBO check is specifically noted as this check on the same side check ensures the order does not trade-through. The Exchange is not substantively amending the current System functionality.

Auction Process

The Exchange's proposal to amend Options 3, Section 13(b)(4) to replace references to "Limit Order," "order" and "orders" with the word "interest" is consistent with the Act and the protection of investors and the general public because an order or quote on the order book may currently interact with a PIXL Order. The proposed rule text makes clear that a quote will participate in a PIXL as unrelated marketable interest. The clarification will make the rule text transparent.

Amending Options 3, Section 13(b)(6) to remove the term "then-existing" from the paragraph is consistent with the Act

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

because the phrase is not necessary as the subsequent clause makes clear which cPBBO will be referenced.

Technical Amendments

The Exchange's proposal to make two technical amendments within Options 4A, Options Index Rules, are consistent with the Act as the amendments to Options 4A, Sections 6 and 12 are non-substantive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

PIXL Entry Checks

Phlx's proposal to amend Options 3, Section 13(a)(1)–(3) to harmonize the language within the PIXL entry checks with language within GEMX's PIM, ISE's PIM, MRX's PIM and BX's PRISM, without changing the substantive operations of these price improvement auctions, does not impose an undue burden on competition because market participants will be able to compare Phlx's PIXL entry checks with similar mechanisms on Nasdaq affiliated markets.

Amending Options 3, Section 13(a)(1)–(3) to specify the entry checks that are utilized by Phlx's System today to initiate a PIXL does not impose an undue burden on competition because these checks will apply uniformly to any order entered into PIXL. Further, the proposed amendments will add transparency to the current System functionality as the various System checks are noted for each side of the PIXL Order. Further, the Exchange is not substantively amending the current System functionality.

Auction Process

The Exchange's proposal to amend Options 3, Section 13(b)(4) to replace references to "Limit Order," "order" and "orders" within Options 3, Section 13(b)(4) with the word "interest" does not impose an undue burden on competition because all quotes will participate in a PIXL as an unrelated order. The clarification will make the rule text transparent.

Amending Options 3, Section 13(b)(6) to remove the term "then-existing" from the paragraph does not impose an undue burden on competition because the phrase is not necessary as the subsequent clause makes clear which cPBBO will be referenced.

Technical Amendments

The Exchange's proposal to make two technical amendments within Options 4A, Options Index Rules, do not impose an undue burden on competition as the amendments to Options 4A, Sections 6 and 12 are non-substantive.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-PHLX-2023-41 on the subject line.

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-PHLX-2023-41. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PHLX-2023-41 and should be submitted on or before October 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-19731 Filed 9-12-23; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the

¹⁰ 17 CFR 200.30-3(a)(12).

collection of information described below. The Paperwork Reduction Act (PRA) requires Federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before November 13, 2023.

ADDRESSES: Send all comments to Gregorius Suryadi, Financial and Loan Specialist, Office of Financial Assistance, Small Business Administration, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Gregorius Suryadi, Financial and Loan Specialist, Office of Financial Assistance, gregorius.suryadi@sba.gov (202) 205-6806, or Curtis B. Rich, Agency Clearance Officer, (202) 205-7030, curtis.rich@sba.gov.

SUPPLEMENTARY INFORMATION: The Small Business Investment Act authorizes SBA to guarantee a debenture issued by a Certified Development Company (CDC). The proceeds from each debenture are used to fund loans to eligible small business concerns ("504 loans"). 15 U.S.C. 697(a). The Small Business Act and the Small Business Investment Act mandate that all guaranteed loans provided by the SBA to small business concerns (SBCs) must have a reasonable assurance of ability to repay. See 15 U.S.C. 636(a)(6) and 687(f); see also 13 CFR 120.150. The information collections SBA Form 1244 is being updated for regulatory and Standard Operating Procedure 50 10 7 changes along with conforming the Form more in alignment with Form 1919, the 7(a) program information collection which was recently updated. SBA has updated borrower certifications and proposes streamlining the Form 1244 based on regulatory and SOP updates as well as public comments from trade associations representing the 504 industry.

Additionally, in accordance to the National Defense Authorization Act (NDAA)/Small Business Runway Extension Act (SBREA) for Fiscal Year 2022 rule, the SBA will use its administrative discretion to permit loan applicants to choose between 3 years and 5 years for receipts-based size standards, and from 12 months to 24 months for employee-based size standards. (15 U.S.C. 632(a)(2))

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the

burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

OMB Control Number: 3245-0071.

Title: Application for Section 504 Loans.

Form Number: SBA Form 1244.

Description of Respondents: Small Business Concerns applying for a section 504 loan and Certified Development Companies.

The information collected by this form is used to review the eligibility of the small business concern (SBC) for SBA financial assistance; the creditworthiness and repayment ability of the SBC; and the terms and conditions of the 504 loan for which the SBC is applying.

SBA has established a streamlined loan application processing procedure known as the Abridged Submission Method (ASM). Under this process, the CDCs are required to collect and retain all exhibits to SBA Form 1244 but are only required to submit selective documents. CDCs using the non-ASM method are required to submit all documents and exhibits required for Form 1244.

The burden estimates (based on the experience of the CDCs and SBA field offices) of the burden hours imposed by use of these forms, including exhibits, are as follows:

There are 200 CDCs affected by the information collection. The total number of small business concerns that will annually respond to Form 1244 is approximately 7,119 based on the average submission of applications submitted from CDCs over the past FY using both the ASM and non-ASM methods. This is a total of 7,119 respondents. Burden hours are 2.25 hours for PCLP Loan and ALP Express Loan, 2.5 hours for ASM, and 3.5 hours for non-ASM submissions.

Submission through delegated authority: $15 \times 2.25 = 34$ burden hours.

Submission through the ASM: $5,695 \times 2.5 = 14,238$ burden hours.

Submission through non-ASM (standard method): $1,409 \times 3.5 = 4,932$ burden hours.

Total burden hours: 19,204.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023-19709 Filed 9-12-23; 8:45 am]

BILLING CODE 8026-09-P

DEPARTMENT OF STATE

[Public Notice: 12183]

60-Day Notice of Proposed Information Collection: Individual, Corporate or Foundation, and Government Donor Form

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to November 13, 2023.

ADDRESSES: You may submit comments by the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to www.Regulations.gov. You can search for the document by entering "Docket Number: DOS-2023-0030" in the Search field. Then click the "Comment Now" button and complete the comment form.

- *Email:* wallacecr2@state.gov.

- *Regular Mail:* Send written comments to: CGFS/EDCS U.S. Department of State, 2201 C Street NW, Room 1821, Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT:

Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Chanel Wallace, who may be reached on (202) 647-7730 or at wallacecr2@state.gov.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Individual, Corporate or Foundation and Government Donor Form.

- *OMB Control Number:* 1405-0218.

- *Type of Request:* Extension of a currently approved collection.

- *Originating Office:* CGFS/Office of Emergencies in the Diplomatic and Consular Service (EDCS).

- *Form Number:* Donor Form—Individual (DS-4273), Donor Form—Corporate or Foundation (DS-4272), Donor Form—Government (DS-4271).

- *Respondents:* Individuals, corporations, or foundations that make donations to the Department.

- *Estimated Number of Respondents:* 5,000.

- *Estimated Number of Responses:* 5,000.
- *Average Time per Response:* 10 minutes per form.
- *Total Estimated Burden Time:* 833 hours.

- *Frequency:* On occasion.
- *Obligation to Respond:* Required to obtain or retain a benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.

- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Office of Emergencies in the Diplomatic and Consular Service (EDCS) manages the solicitation and acceptance of gifts to the U.S. Department of State. The information requested via donor letters is a necessary first step to accepting donations. The information is sought pursuant to 22 U.S.C. 2697, 5 U.S.C. 7324 and 22 CFR part 3, and will be used by EDCS's Gift Fund Coordinator to demonstrate the donor's intention to donate either an in-kind or monetary gift to the Department. This information is mandatory and must be completed before the gift is received by the Department.

Methodology

The Department of State has the authority to accept gifts made for the benefit of the Department or for carrying out its functions. There are two types of gifts: in-kind, such as goods or services; and cash donations. The authorized requesting office must review the due diligence memorandum to make a determined judgment that soliciting and accepting a gift from a U.S. based or nonfederal entity would not cause embarrassment or harm to the Department or its reputation. Once a donation is approved by the soliciting

office, donors are granted access to the Departments appropriate donor form for completion. A donor will receive an electronic copy of the form from the program office once approved to partner or donation to the Department for official solicitation and acceptance. The donor is required to make all donations payable directly to the Department of State sent with a donor form to CGFS/EDCS.

CGFS/EDCS accepts payment in the form of checks or wire transfers, there are two methodologies for completing and submitting this form, as opposed to being done only electronically.

Option 1 (Electronically): The soliciting program officer will send the Donor Form electronically (retrieved from the Departments' internal myData Forms used for printing and electronic submissions) to recipients who will complete it and return to EDCS at MEDCS@state.gov. The donors submit their payments through the Global Financial Operations (CGFS/GFO) where they provide financial instructions for the remittance of Automated Clearing House (ACH) credits to the United States Department of State.

Option2: (Hard Copy): The soliciting program officer will send the Donor Form electronically and the donor will print and mail the form with a personal check or money order and return to EDCS by mail at 2201 C Street NW, Room 1821, Washington, DC 20520. CGFS/EDCS will deposit the donation in accordance with approved procedures, and the Bureau of Budget and Planning allots funds to the appropriate bureau.

Crystal F. Jobe,

Director, Gift Funds and K Fund Coordinator, CGFS/EDCS, Department of State.

[FR Doc. 2023-19698 Filed 9-12-23; 8:45 am]

BILLING CODE 4710-37-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36720]

Macquarie Infrastructure Partners V GP, LLC—Control Exemption—Pioneer Valley Railroad Company, Inc.

Macquarie Infrastructure Partners V GP, LLC (MIP GP), a noncarrier, filed on behalf of MIP Infrastructure Partners V fund vehicle (MIP V), MIP V Rail, LLC (MIP Rail), and Gulf & Atlantic Railways, LLC (G&A),¹ a verified notice

¹ The verified notice states that G&A is wholly owned by MIP Rail, which is wholly owned (indirectly) by MIP V. MIP V is controlled by MIP GP.

of exemption under 49 CFR 1180.2(d)(2) to acquire control of Pioneer Valley Railroad Company, Inc. (PVRR),² a Class III carrier currently controlled by Pinsly Railroad Company (Pinsly), a non-carrier.

The verified notice states that, pursuant to a Purchase Agreement dated August 19, 2023,³ G&A has agreed to acquire from Pinsly 100% of the equity interests of PVRR. Currently, G&A directly controls, and MIP GP, MIP V, and MIP Rail indirectly control, five rail carriers: Grenada Railroad, LLC; Florida Gulf & Atlantic Railroad, LLC; Camp Chase Rail, LLC; Chesapeake and Indiana Railroad, LLC; and Vermilion Valley Railroad Company LLC.⁴

MIP GP states that: (1) PVRR does not connect with any of the railroads that would be in the same corporate family following the transaction; (2) the proposed transaction is not part of a series of anticipated transactions that would connect PVRR with any railroad in its corporate family; and (3) the transaction does not involve a Class I rail carrier. Therefore, the proposed transaction is exempt from the prior approval requirements of 49 U.S.C. 1123. See 49 CFR 1180.2(d)(2).

The earliest this transaction may be consummated is September 27, 2023, the effective date of the exemption (30 days after the verified notice was filed).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be

² PVRR operates approximately 27 miles of track, including 18 mainline miles, in Massachusetts. One of PVRR's lines runs north from Westfield, Mass., towards Southampton, Mass. The other line runs northeast from Westfield to Holyoke, Mass.

³ Public and confidential versions of the Purchase Agreement were filed with the verified notice. The confidential version was submitted under seal concurrently with a motion for protective order, which is addressed in a separate decision.

⁴ See *Macquarie Infrastructure Partners V GP, LLC—Control Exemption—Camp Chase Rail, Chesapeake & Ind. R.R., & Vermilion Valley R.R.*, FD 36685 (STB served Apr. 7, 2023).

filed no later than September 20, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36720, should be filed with the Surface Transportation Board via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on MIP GP's representative, Terence M. Hynes, Sidley Austin LLP, 1501 K Street NW, Washington, DC 20005.

According to MIP GP, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: September 7, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Regena Smith-Bernard,
Clearance Clerk.

[FR Doc. 2023-19777 Filed 9-12-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36704]

The Warren & Trumbull Railroad Company—Acquisition and Operation Exemption—Economic Development Rail II Corporation

The Warren & Trumbull Railroad Company (WTRC), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from Economic Development Rail II Corporation (EDR-II), and to operate approximately 8.97 miles of rail line and associated right-of-way including: (1) the property known as North Warren Railroad located along the 2.78 miles of track between milepost 91.60 near the North Warren Station in Warren, Ohio and milepost 94.38 at North Warren in North Trumbull, Ohio; (2) the property known as a portion of Conrail's Freedom Secondary Railroad between milepost 164.52 and milepost 160.60 in Warren, Ohio, and the K-Mart Lead extending from its connection with the Freedom Secondary at milepost 81.00 up to and including milepost 81.70; (3) the K-Mart Lead from milepost 81.70 up to and including milepost 82.90; and (4) the section of track beginning at milepost 82.90 up to and including track to the east R.O.W. of Park Avenue being 1435.61 feet ± (the Lines).

According to the verified notice, WTRC has operated over the Lines pursuant to an agreement between WTRC and EDR-II, and now WTRC seeks authority to acquire ownership of the Lines from EDR II.

The verified notice states that the parties entered into a Purchase and Sale Agreement for WTRC to acquire and operate the Lines. WTRC states that the transaction will proceed as of the effective date of this notice of exemption.

WTRC certifies that the proposed acquisition of the Lines does not involve any interchange commitments. WTRC further certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III carrier and will not exceed \$5 million.

The transaction may be consummated on or after September 27, 2023, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 20, 2023.

All pleadings, referring to Docket No. FD 36704, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, one copy of each pleading must be served on WTRC's representative, Eric M. Hocky, Clark Hill PLC, Two Commerce Square, 2001 Market Street, Suite 2620, Philadelphia, PA 19103.

According to WTRC, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: September 8, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Raina White,
Clearance Clerk.

[FR Doc. 2023-19788 Filed 9-12-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36705]

Youngstown & Austintown Railroad, Inc.—Acquisition and Operation Exemption—Economic Development Rail Corporation

Youngstown & Austintown Railroad, Inc. (YARR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from Economic Development Rail Corporation (EDRC) and to operate approximately 2.74 miles of rail line known as the Y and A Branch (Line Code 6556) (Austintown Industrial Track) from approximately milepost 0.76 (at a point south of the clearance point of the switch connection with CSX Transportation, Inc.) to approximately milepost 3.50 (at the northerly right-of-way line of Oakwood Avenue) in Youngstown, Mahoning County, Ohio (the Line). According to the verified notice, YARR is the current operator of the Line, having operated over the Line pursuant to an operating agreement between YARR and EDRC for over 30 years.

The verified notice states that YARR has entered into a Purchase and Sale Agreement to acquire the Line from EDRC so that YARR can become the owner of the Line, as well as the operator.

YARR certifies that the proposed acquisition of the Line does not involve any interchange commitments. YARR further certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III carrier and that its projected annual revenue will not exceed \$5 million.

The transaction may be consummated on or after September 27, 2023, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than September 20, 2023.

All pleadings referring to Docket No. FD 36705, should be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, one copy of each pleading must be served on YARR's representative, Eric M. Hocky, Clark Hill PLC, Two Commerce Square, 2001

Market St., Suite 2620, Philadelphia, PA 19103.

According to YARR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: September 7, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Eden Besera,

Clearance Clerk.

[FR Doc. 2023–19752 Filed 9–12–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2021–0010]

Surface Transportation Project Delivery Program; Utah Department of Transportation Audit Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP–21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed in lieu of FHWA. The program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice finalizes the findings of the fourth and final audit report for the Utah Department of Transportation (UDOT).

FOR FURTHER INFORMATION CONTACT: Mr. David Cohen, Office of Project Development and Environmental Review, (202) 366–8531, David.Cohen@dot.gov, or Ms. Diane Mobley, Office of the Chief Counsel, (202) 366–1366, Diane.Mobley@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C.) 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities in lieu of FHWA. The UDOT published its application for NEPA assumption on October 9, 2015, and made it available for public comment for 30 days. After considering public comments, UDOT submitted its application to FHWA on December 1, 2015. The application served as the basis for developing a memorandum of understanding (MOU) that identifies the responsibilities and obligations that UDOT would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on November 16, 2016 (81 FR 80710), with a 30-day comment period to solicit the views of the public and Federal agencies. After the end of the comment period, FHWA and UDOT considered comments and proceeded to execute the MOU. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA, and the responsibilities for other Federal environmental laws described in the MOU. On May 26, 2022, FHWA and UDOT renewed the MOU for another 5-year term.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits during each of the first 4 years of State participation. After the fourth year, the Secretary shall monitor the State's compliance with the written agreement. The FHWA must make the results of each audit available for public comment. This notice finalizes the findings of the fourth audit report for UDOT participation in the NEPA Assignment Program. The FHWA published a draft version of this report in the **Federal Register** on June 23, 2022 (87 FR 37547), and made it available for public review and comment for 30 days in accordance with 23 U.S.C. 327(g). The FHWA received three responses to the **Federal Register** notice during the public comment period for the draft report, and FHWA responds to these comments in the final report, pursuant to 23 U.S.C. 327(g)(2). The FHWA also determined that the comments required

no changes to the draft audit report. This notice finalizes the fourth and final NEPA Assignment audit report in Utah.

Authority: Section 1313 of Public Law 112–141; Section 6005 of Public Law 109–59; 23 U.S.C. 327; 23 CFR 773.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

Surface Transportation Project Delivery Program, FHWA Audit of the Utah Department of Transportation—Final Report, July 1, 2019–June 30, 2020

Executive Summary

This report summarizes the results of the Federal Highway Administration's (FHWA) fourth and final audit of the Utah Department of Transportation's (UDOT) National Environmental Policy Act (NEPA) review responsibilities and obligations that FHWA assigned and UDOT assumed pursuant to 23 United States Code (U.S.C.) 327. Throughout this report, FHWA uses the term “NEPA Assignment Program” to refer to the program codified at 23 U.S.C. 327. Pursuant to 23 U.S.C. 327, UDOT and FHWA executed a memorandum of understanding (MOU) on January 17, 2017, to memorialize UDOT's NEPA responsibilities and obligations for Federal-aid highway projects and certain other FHWA actions in Utah. The FHWA and UDOT recently renewed the MOU on May 26, 2022, for another 5-year term. The section 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated documented categorical exclusions (DCE). A separate MOU, pursuant to 23 U.S.C. 326, authorizes UDOT's environmental review responsibilities for other categorical exclusions (CE), commonly known as CE Program Assignment. The scope of this audit did not include the CE Program Assignment responsibilities and projects.

As part of FHWA's review responsibilities under 23 U.S.C. 327, FHWA formed a team (the “Audit Team”) in August 2020 to plan and conduct an audit of NEPA responsibilities UDOT assumed. Due to COVID–19-related travel restrictions, the Audit Team conducted a virtual audit during the period from November 9, 2020, to December 2, 2020. Prior to the virtual audit, the Audit Team reviewed UDOT's NEPA project files, UDOT's response to FHWA's pre-audit information request (PAIR), UDOT's NEPA Assignment Self-Assessment Report, UDOT's NEPA Quality Assurance/Quality Control (QA/QC)

Guidance, and UDOT's NEPA Assignment Training Plan. The Audit Team conducted videoconference interviews with four members of UDOT central office staff, six of UDOT's legal counsel (one current Assistant Attorney General assigned to UDOT, one former Assistant Attorney General assigned to UDOT, and four outside counsel), three staff members from the U.S. Environmental Protection Agency, and two staff members from the U.S. Fish and Wildlife Service (FWS) as part of the virtual audit.

Overall, the Audit Team found that UDOT continues to successfully carry out its DCE, EA, and EIS project review responsibilities. The UDOT has also made efforts to respond to the FHWA findings from the third audit, including improving document management and QA/QC procedures. In the third audit, the Audit Team found that UDOT issued an environmental document without a final legal sufficiency finding, and had observed that there were ways UDOT could improve their training.

In this fourth and final audit, the Audit Team identified four observations and two successful practices. The Audit Team finds UDOT is carrying out the responsibilities it has assumed, and they are in substantial compliance with the provisions of the MOU. This report also concludes with the status of FHWA's non-compliance observation from the third audit review, including any UDOT self-imposed corrective actions. After the fourth year of UDOT's participation in the program, FHWA will continue to monitor UDOT's compliance with the terms of this MOU, in accordance with 23 U.S.C. 327(h).

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal-aid highway projects and certain other FHWA actions. Under 23 U.S.C. 327, a State that assumes these Federal responsibilities becomes solely responsible and solely liable for carrying them out. Effective January 17, 2017, UDOT assumed FHWA's responsibilities under NEPA and other Federal environmental laws. Examples of responsibilities UDOT has assumed in addition to NEPA include section 7 consultation under the Endangered Species Act and consultation under section 106 of the National Historic Preservation Act.

Audits are the primary mechanism through which FHWA oversees UDOT's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring

compliance with the applicable Federal laws and policies, evaluating UDOT's progress toward achieving the performance measures identified in MOU Section 10.2, and collecting information needed for the Secretary's annual report to Congress. The FHWA must present the results of each audit in a report and make it available for public comment in the **Federal Register**. Through this fourth and final audit, FHWA will satisfy provisions of 23 U.S.C. 327(g) and Part 11 of the MOU. This report summarizes the results of the fourth and final audit in Utah, and it includes a summary discussion that describes progress since the last audit.

Scope and Methodology

The MOU (Part 3.1.1) states that "[p]ursuant to 23 U.S.C. 327(a)(2)(A), on the effective date, FHWA assigns, and UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the U.S. Department of Transportation Secretary's responsibilities for compliance with the NEPA, 42 U.S.C. 4321 *et seq.* with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 CFR parts 1500–1508, DOT Order 5610.1C, and 23 CFR 771 as applicable." Also, the performance measure in MOU Part 10.2.1(A) for compliance with NEPA and other Federal environmental statutes and regulations commits UDOT to maintaining documented compliance with requirements of all applicable statutes and regulations as well as the provisions in the MOU.

The Audit Team consisted of NEPA subject matter experts from the FHWA Utah Division, FHWA Resource Center, the Volpe Center, FHWA Headquarters, and FHWA Office of the Chief Counsel. These experts received training on how to evaluate implementation of the NEPA Assignment Program.

The Audit Team conducted an examination of UDOT's NEPA project files, UDOT's responses to the PAIR, and UDOT's self-assessment. The audit also included interviews with staff and reviews of UDOT policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements: program management; documentation and records management; QA/QC; legal sufficiency; training; and performance measurement. In particular, the Audit Team reviewed UDOT's process and

procedures for conducting environmental reevaluations.

The focus of the audit was on UDOT's process and program implementation. Therefore, while the Audit Team reviewed project files to evaluate UDOT's NEPA process and procedures, the Audit Team did not evaluate UDOT's project-specific decisions to determine if they were, in FHWA's opinion, appropriate or not. The Audit Team reviewed 20 NEPA Project files with DCEs, EAs, EISs, and reevaluations, representing all projects with decision points or other actionable items between July 1, 2019, and June 30, 2020. The Audit Team also interviewed environmental staff in UDOT's headquarters office.

The PAIR consisted of 25 questions about specific elements in the MOU. The Audit Team used UDOT's response to the PAIR to develop specific follow-up questions for the UDOT staff. The Audit Team conducted four interviews with UDOT environmental staff, one virtual interview with staff from the U.S. Environmental Protection Agency (EPA), one interview with staff from the FWS, two interviews with UDOT's outside legal counsel, and one interview with legal counsel from the Utah Attorney General's Office. All interviews were conducted as videoconferences.

Throughout the document reviews and interviews, the Audit Team verified information regarding the UDOT NEPA Assignment Program including UDOT policies, guidance, manuals, and reports. This included the NEPA QA/QC Guidance, the NEPA Assignment Training Plan, and the NEPA Assignment Self-Assessment Report.

The Audit Team compared the procedures outlined in UDOT environmental manuals and policies to the information obtained during interviews and project file reviews to determine if there were discrepancies between UDOT's performance and documented procedures. The Audit Team documented observations under the six NEPA Assignment Program topic areas and arrived at the following audit opinion.

Overall, UDOT has carried out the environmental responsibilities it assumed through the MOU and the application for the NEPA Assignment Program, and as such, the Audit Team finds UDOT is substantially compliant with the provisions of the MOU.

Observations and Successful Practices

This section summarizes the Audit Team's observations of UDOT's NEPA Assignment Program implementation, including successful practices UDOT

may want to continue or expand. Successful practices are positive results FHWA would like to commend UDOT for developing. These may include ideas or concepts that UDOT has planned but not yet implemented. Observations are items that the Audit Team would like to draw UDOT's attention to, which may benefit from revisions to improve processes, procedures, or outcomes. The UDOT may have already taken steps to address or improve upon the Audit Team's observations, but at the time of the audit they appeared to be areas where UDOT could make improvements. This report addresses all six MOU topic areas as separate discussions. Within each area, this report discusses successful practices followed by observations.

This audit report provides an opportunity for UDOT to implement actions to improve their NEPA Assignment Program. The FHWA and UDOT will continue to work together to monitor UDOT's compliance with the terms of this MOU, as required by 23 U.S.C. 327(h).

Program Management

Successful Practice #1

The Audit Team identified one of UDOT's project websites which included detailed information about the proposed noise impact analyses, traffic noise abatement measures, and the proposed relocation of the existing noise barriers as a successful practice. The noise impact and abatement information presented to the public was comprehensive and easy to understand.

Observation #1

Section 5.1.4 of UDOT's NEPA Assignment MOU outlines an interagency planning and coordination protocol to make sure that all programmatic agreements reflect UDOT's new roles and responsibilities under NEPA Assignment. The Audit Team observed that UDOT's Section 106 programmatic agreements with four Tribal governments predate NEPA Assignment, and they do not reflect UDOT's assigned roles and responsibilities. We recommend that UDOT reach out to these Tribal governments and implement the interagency planning and coordination provisions of Section 5.1.4, which may include amending the programmatic agreements or obtaining a "written consent." The recommended path forward would enable UDOT to clarify its assigned roles and responsibilities during Section 106 consultations. The overall consistency across all five of the Section 106 programmatic agreements is

important to clarify the organizational roles and responsibilities between UDOT and FHWA for both Section 106 and Government-to-Government consultations, resulting in more predictable lines of communication, more productive and meaningful interagency dialogue with the Tribes, and a positive reinforcement of FHWA's retained Tribal trust responsibilities.

Observation #2

In the course of reviewing the most recent Manual of Instruction (MOI), the Audit Team identified several areas that do not address the most recent requirements and guidelines associated with the Fixing America's Surface Transportation Act; FHWA's 2019 Reevaluation Q&A Guidance; Moving Ahead for Progress in the 21st Century Act Section 1319 interim guidance relating to the appropriate use of the combined Final Environment Impact Statement/Record of Decision documents; FHWA's 2011 Environmental Justice and NEPA guidance for identifying, disclosing and mitigating impacts to environmental justice communities; or FHWA's October 2018 memorandum addressing activities that may be completed prior to issuance of a Notice of Intent to prepare an EIS. During interviews, UDOT informed us that they make regular updates to the MOI, as needed. However, these examples illustrate that the MOI would benefit from a regularly scheduled, comprehensive review to ensure that it reflects current national policy and guidance.

Documentation and Records Management

Successful Practice #1

During this audit period, the Audit Team reviewed reevaluations for two EIS projects that appeared to use the same format. While it is not explicitly required by the MOI, UDOT did appear to use a standard procedure for these reevaluations. For example, both included a Summary of Re-evaluation Analysis Table that functions like an environmental checklist. This table creates a standard process for looking at changes in both the magnitude of project impacts, as well as project scope modifications.

Observation #1

The team reviewed multiple reevaluations for the West Davis Corridor Project. Each individual reevaluation addressed the changes on that portion of the larger project. The FHWA suggests UDOT also add language that summarizes the changes

across all the reevaluations, such as providing a listing of all the related reevaluations and a statement correlating them, to clearly demonstrate and document that UDOT has considered impacts across the entirety of the project.

Quality Assurance/Quality Control

The UDOT has made improvements to its QA/QC procedures. These improvements are discussed in the Legal Sufficiency section of this report.

Legal Sufficiency

During the audit period outside counsel issued three findings of legal sufficiency per the requirements of 23 CFR 771.125(b) and 23 CFR 774.7(d), copies of which were provided to the Audit Team. These include legal sufficiency reviews of one EIS and two Section 4(f) evaluations. The UDOT has continued using the legal sufficiency process it put in place for both Section 326 CE and Section 327 NEPA Assignment; that is, contracting with outside counsel who have extensive experience in NEPA, other environmental laws, and Federal environmental litigation. Since the signing of the initial FHWA-UDOT MOU for the NEPA Assignment Program in January 2017, no lawsuits have been filed against NEPA-assigned projects in the State of Utah.

Training

The UDOT has continued to develop an annual training plan, in compliance with Section 12.2 of the MOU.

Performance Measures

The UDOT has continued to assess its performance as required under the terms of the MOU. The UDOT's annual self-assessment report indicates that they are meeting their performance targets. The process of, and results from, the State's self-assessment have been an important factor in the improvement of UDOT's NEPA Program. *Observation #1* Section 10.2.1.C.i of the MOU requires UDOT to assess change in and ensure effective communication among UDOT, Federal, and State resource agencies resulting from assumption of responsibilities under the MOU. In interviews, resource agency staff at the EPA and the FWS stated that overall they have a good working relationship with UDOT staff. Some FWS staff indicated that they could utilize additional information on the differences between the 23 U.S.C. 326 (CE Assignment) program and the 23 U.S.C. 327 (NEPA Assignment) program. The Audit Team also learned that neither FWS nor EPA had responded to

UDOT's annual resource agency survey. These are examples of where UDOT's program may benefit from more consistent, program-level discussions with resource agencies to ensure that all parties understand their respective roles and responsibilities, as well as the provisions of the 326 and 327 programs. Stronger managerial-level communications with the resource agencies may increase their understanding of the importance of the survey and improve the response rate.

No Non-Compliance Observations in Audit #4

Non-compliance observations are instances where the team found UDOT was out of compliance or deficient in proper implementation of a Federal regulation, statute, guidance, policy, the terms of the MOU, or UDOT's own procedures for compliance with the NEPA process. Such observations may also include instances where UDOT has failed to maintain technical competency, adequate personnel, and/or financial resources to carry out the assumed responsibilities. Other noncompliance observations could suggest a persistent failure to adequately consult, coordinate, or consider the concerns of other Federal, State, Tribal, or local agencies with oversight, consultation, or coordination responsibilities. The FHWA expects UDOT to develop and implement corrective actions to address all non-compliance observations. The Audit Team did not identify any non-compliance observations during this audit.

Follow-up on the Prior Non-Compliance Observations From Audit #3

The FHWA had reported a noncompliance observation relating to UDOT not complying with the State's environmental review procedures as a part of Audit #3. *2019 Audit #3—Issuing a Document Without Final Legal Sufficiency Finding* As noted earlier, in response to the 2019 audit finding that legal sufficiency review documentation was not provided prior to approval of a project FEIS, UDOT and outside counsel implemented a more formalized system by instituting a Legal Sufficiency Review Form to be completed by UDOT's outside counsel. The form would ensure a record that the legal sufficiency review occurred. The Audit Team confirmed that UDOT developed and implemented the form for the legal sufficiency reviews during this audit period.

Response to Public Comments on the Draft Report and the Final Report

The FHWA received and responded to three comments on the draft audit report, pursuant to 23 U.S.C. 327(g)(2). The American Road & Transportation Builders Association (ARTBA) commented that they are in general support of UDOT's implementation of the NEPA Assignment Program to accelerate Federal-aid highway program and project delivery in Utah. The FHWA appreciates ARTBA's input. A private citizen commented that he is not supportive of UDOT's implementation of the NEPA Assignment Program, due to his experience with the Northern Corridor Highway Project in the Bureau of Land Management's (BLM) Red Cliffs National Conservation Area. The Audit Team, in conjunction with the FHWA Utah Division Office, independently reviewed and confirmed that the Federal action associated with this concern was the BLM's Federal land management decision, including BLM's NEPA approval for that Federal land management decision. It was not a NEPA approval by UDOT under the NEPA Assignment Program. Finally, an anonymous commenter raised concerns about UDOT's traffic noise abatement procedures as they apply to local public agencies. Based on FHWA's traffic noise abatement regulations in 23 CFR 772.7(b), UDOT has developed noise policies in conformance with 23 CFR part 772, and FHWA Utah Division Office approved them. The UDOT is required to apply these policies uniformly and consistently statewide, including the uniform and consistent application to the NEPA reviews of the Federal-aid highway projects administered by the local public agencies in Utah.

After reviewing the public comments, and looking into the concerns raised in the comments, FHWA determined that there is no need to revise the draft audit report. The FHWA may also consider the public comments in scoping the future NEPA Assignment monitoring reviews in Utah.

Therefore, FHWA is finalizing UDOT's fourth and final NEPA Assignment audit report with this **Federal Register** notice.

[FR Doc. 2023-19705 Filed 9-12-23; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2023-0023]

National Bridge Inspection Program Compliance Review Manual

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice; request for comments.

SUMMARY: This notice requests comments on the Performance Year (PY) 2024 Interim National Bridge Inspection Program (NBIP) Compliance Review Manual outlining the procedures FHWA Division Bridge Engineers will follow during calendar year 2023 when performing compliance reviews of State department of transportation bridge safety inspection programs. The PY 2024 Interim NBIP Compliance Review Manual incorporates revised provisions of the National Bridge Inspection Standards (NBIS), which came into effect June 6, 2022. The FHWA will consider all comments received during the comment period in developing subsequent versions of the NBIP Compliance Review Manual. However, please note that the PY 2024 Interim NBIP Compliance Review Manual is currently in effect and will be utilized by FHWA Division Bridge Engineers for the calendar year 2023 reviews.

DATES: Comments must be received on or before October 13, 2023. Late-filed comments will be considered to the extent practicable.

To ensure that you do not duplicate your docket submissions, please submit all comments by only one of the following means:

- **Federal eRulemaking Portal:** Go to www.regulations.gov and follow the online instructions for submitting comments.

- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590.

- **Hand Delivery:** West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

- **Instructions:** You must include the agency name and docket number at the beginning of your comments. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, contact Ms.

Samantha Lubkin, Safety Inspection Team Leader, FHWA Office of Bridges and Structures, (202) 366–1575, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, or via email at samantha.lubkin@dot.gov. For legal questions, please contact Mr. William Winne, Attorney Advisor, FHWA Office of the Chief Counsel, (202) 366–1397, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, or via email at william.winne@dot.gov. Business hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

A copy of the PY 2024 Interim NBIP Compliance Review Manual is available for download and public inspection under the docket number noted above at the Federal eRulemaking portal at: www.regulations.gov. You may submit or retrieve comments online through the Federal eRulemaking portal at: www.regulations.gov. The website is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the website.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: www.federalregister.gov and the Government Printing Office's web page at: www.GovInfo.gov. Late comments will be considered to the extent practicable.

Background

For more than 45 years, FHWA has annually assessed each State's bridge inspection program to evaluate compliance with the NBIS as codified at 23 CFR 650, subpart C. Historically, the depth and scope of the reviews varied based upon FHWA's knowledge of the State's inspection program and the experience of FHWA staff. In 2009, the Office of Inspector General (OIG) issued an audit report National Bridge Inspection Program: Assessment of FHWA's Implementation of Data-Driven, Risk-Based Oversight¹ that summarized its review of FHWA oversight of the NBIP. One of the five OIG recommendations from this audit was for FHWA to develop and implement minimum requirements for a data-driven, risk-based process for Division Bridge Engineers to use for their annual NBIP compliance reviews.

Senate Report 110–418² supported the OIG recommendations and the need for prompt action by FHWA. In addition, Conference Report 111–366,³ directed FHWA to improve its oversight of bridge safety and conditions.

In response to the OIG recommendations and congressional direction, FHWA developed a new systematic, data-driven, risk-based oversight process for monitoring State compliance with the NBIS. In 2010, FHWA initiated a pilot program using the new process in nine States. The FHWA made adjustments following the pilot in preparation for nationwide implementation in February 2011. After the nationwide implementation, in the fall of 2011, FHWA and the American Association of State Highway and Transportation Officials (AASHTO) established a joint task force to further identify possible modifications or improvements to the assessment process. As a first step, the joint task force gathered information from all States and interested Federal Agencies, including their input and feedback on the assessment process. The FHWA collected information from internal staff, and AASHTO gathered information from the States. The joint task force used the information collected to help identify and prioritize improvements to the process. The joint task force efforts resulted in FHWA implementing several improvements in April 2012.

Section 1111 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405) amended 23 U.S.C. 144(h)(3)(A)(i) to include provisions for the Secretary to establish, in consultation with the States, Federal Agencies, and interested and knowledgeable private organizations and individuals, procedures to conduct reviews of State compliance with the NBIS. The MAP–21 also amended 23 U.S.C. 144(h)(5) to establish a penalty for States determined to be in noncompliance with the NBIS.

The FHWA developed and implemented the current review process to evaluate a State's bridge inspection program for compliance with the NBIS prior to the requirements of MAP–21, section 1111. The development of the review process included consultation with stakeholders through the pilot project, the joint FHWA/AASHTO task force, as well as with individual States and Federal Agencies during the initial implementation of the process in 2011. The FHWA continued to use the risk-

based, data-driven review process that was implemented in 2011 to evaluate State compliance with the NBIS as required by 23 U.S.C. 144(h)(4)(A).

On June 7, 2013, at 78 FR 34424, FHWA published a notice requesting comment on the process FHWA uses to conduct reviews of State compliance with the NBIS and the associated penalty process for findings of noncompliance. The FHWA responded to comments received and implemented the compliance review procedures and the penalty provisions in 23 U.S.C. 144(h)(5). The FHWA later documented the process in FHWA's NBIP Compliance Review Manual.

On May 6, 2022, at 87 FR 27396, FHWA published a final rule updating the NBIS regulations as required by MAP–21. The NBIS regulations were revised to address MAP–21 requirements, incorporate technological advancements, and address ambiguities identified since the last update of the NBIS. The rule became effective June 6, 2022. Most of the revised requirements were also effective on that date, but some provisions will become effective 24 months later, June 6, 2024. In addition, some provisions of the rule relating to data submissions in accordance with the Specifications for the National Bridge Inventory will not be able to be implemented until the States have the necessary data collection and management systems in place. The timeline for the data submissions in the new format is expected to commence with the States' March 2026 data submissions.

Under 23 U.S.C. 144(h), FHWA is required to revise the compliance review criteria to address the recent changes to the NBIS. The PY 2024 Interim NBIP Compliance Review Manual incorporates the revised provisions of the NBIS, 23 CFR part 650, subpart C, that are currently in effect. The PY 2024 Interim Compliance Review Manual designates new criteria and review procedures that will be evaluated for compliance in calendar year 2023 in a bold and underlined text format. A blue and italicized font is used to indicate criteria that will be assessed for compliance beginning in the PY 2025 reviews. The intent of including the PY 2025 information is to give the States a preview of next year's criteria to aid in the States' preparation. It is anticipated that the NBIP Compliance Review Manual will need to be slightly modified in successive years to reflect changes resulting from full implementation of the updated NBIS and provisions that became effective after June 6, 2022.

² Senate Report 110–418; Link to Report.

³ House of Representatives Conference Report 111–366; Link to Report.

¹ Report MH–2009–013; Link to OIG Report.

The FHWA welcomes comments on the PY 2024 Interim NBIP Compliance Review Manual from any interested party, including Federal, State, and local agencies; industry groups; and the public. A copy of the PY 2024 Interim NBIP Compliance Review Manual is available for download and public inspection under the docket number noted above at the Federal eRulemaking portal at: www.regulations.gov. The FHWA requests that commenters cite the page number of the manual for which each specific comment to the docket is concerned, to help make the FHWA's docket comment review process more efficient. The FHWA will consider all comments received during the comment period in developing subsequent versions of the NBIP Compliance Review Manual. However, please note that the PY 2024 Interim NBIP Compliance Review Manual is currently in effect and will be utilized for calendar year 2023 reviews.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

[FR Doc. 2023-19702 Filed 9-12-23; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2021-0019]

Surface Transportation Project Delivery Program; Alaska Department of Transportation Fourth Audit Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act (MAP-21) established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This notice makes available the final fourth audit report for the Alaska Department of Transportation and Public Facilities (DOT&PF).

FOR FURTHER INFORMATION CONTACT: Mr. David T. Williams, Office of Project Development and Environmental Review, (202) 366-5074, David.Williams@dot.gov, or Michelle Andotra, Office of the Chief Counsel, (404) 562-3679, Michelle.Andotra@dot.gov; Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The Alaska DOT&PF published its application for NEPA assumption on May 1, 2016; and made it available for public comment for 30 days. After considering public comments, DOT&PF submitted its application to FHWA on July 12, 2016. The application served as the basis for developing a memorandum of understanding (MOU) that identified the responsibilities and obligations that DOT&PF would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on August 25, 2017, with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and DOT&PF considered comments and proceeded to execute the MOU. Effective November 13, 2017, DOT&PF assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The FHWA must make the results of each audit available for public comment. The FHWA published a notice in the **Federal Register** at 87 FR 66352, November 3, 2022, soliciting comments

for 30 days pursuant to 23 U.S.C. 327(g). The FHWA received comments on the draft report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to the audit. The team has considered these comments in finalizing the audit report. This notice makes available the final audit report of DOT&PF's fourth audit under the program. The final audit report is available for download at www.regulations.gov under FHWA Docket No. FHWA-2021-0019.

Authority: Section 1313 of Public Law 112-141; section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

Surface Transportation Project Delivery Program, FHWA's Audit of the Alaska Department of Transportation, April 12-16, 2021

Executive Summary

This report summarizes the results of the Federal Highway Administration's (FHWA) fourth audit of the Alaska Department of Transportation and Public Facilities' (DOT&PF) assumption of FHWA's project-level National Environmental Policy Act (NEPA) responsibilities and obligations pursuant to a 23 U.S.C. 327 memorandum of understanding (MOU). The DOT&PF entered the NEPA Assignment Program after more than 8 years of experience making FHWA NEPA Categorical Exclusion (CE) determinations pursuant to 23 U.S.C. 326 (beginning September 22, 2009).

Alaska's MOU became effective on November 13, 2017, and was amended on August 20, 2020. Currently, FHWA's NEPA responsibilities in Alaska include the oversight and auditing of the DOT&PF's execution of the NEPA Assignment Program and certain activities excluded from the MOU, such as the NEPA reviews of projects advanced by direct recipients other than the DOT&PF.

The FHWA audit team began to prepare for the site visit in November 2020. The audit team reviewed DOT&PF's NEPA project files, DOT&PF's response to FHWA's pre-audit information request (PAIR), and DOT&PF's Self-Assessment Report. On April 12-16, 2021, the audit team conducted a virtual site visit for the second year due to COVID-19 pandemic safety concerns, rather than on-site visits as had been used for the first two audits.

The audit team appreciates DOT&PF's responsiveness to the questions regarding the status of general observations from the third audit. This report concludes with a status update for FHWA's observations from the third audit report.

The audit team finds DOT&PF in substantial compliance with the terms of the MOU in meeting the responsibilities it has assumed. This report does not identify any non-compliance observations; it does identify four general observations and three successful practices.

Background

The NEPA Assignment Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for highway projects. This program is codified at 23 U.S.C. 327. When a State assumes these Federal responsibilities for NEPA project decisionmaking, the State becomes solely responsible and solely liable for carrying out these obligations in lieu of and without further NEPA-related approval by FHWA.

The FHWA assigned responsibility for making project NEPA approvals and other related environmental decisions for highway projects to DOT&PF. The MOU documents these responsibilities. Examples of responsibilities DOT&PF has assumed, in addition to NEPA, include Section 7 consultation under the Endangered Species Act and consultation under Section 106 of the National Historic Preservation Act.

This is the last of the four required annual audits pursuant to 23 U.S.C. 327(g) and Part 11 of the MOU. The FHWA uses audits as the primary mechanism to oversee DOT&PF's compliance with the MOU and the NEPA Assignment Program requirements. This includes ensuring compliance with applicable Federal laws and policies, evaluating DOT&PF's progress toward achieving the performance measures identified in Section 10.2 of the MOU, and collecting information needed for the U.S. Department of Transportation (DOT) Secretary's annual report to Congress. The FHWA must present its audit results in a report and make it available for public comment in the **Federal Register**.

The audit team included NEPA subject matter experts from FHWA's Alaska Division Office, the Headquarters Office of Project Development and Environmental Review, the Resource Center, Western Legal Services Division, Office of Stewardship, Oversight and

Management, and the DOT Volpe Center.

Scope and Methodology

The audit team examined a sample of DOT&PF's NEPA project files, DOT&PF responses to the PAIR, and DOT&PF's Self-Assessment Report. The audit team also conducted interviews and reviewed DOT&PF policies, guidance, and manuals pertaining to NEPA responsibilities. All reviews focused on objectives related to the six NEPA Assignment Program elements contained in the MOU: Program Management, Documentation and Records Management, Quality Assurance/Quality Control (QA/QC), Training, Performance Measures, and Legal Sufficiency.

Project File Review: To consider DOT&PF staff adherence to program procedures and Federal requirements, the audit team selected a sample of 47 individual project files for which the environmental review had been completed. The audit team evaluated DOT&PF's compliance with assumed responsibilities and adherence to their own processes and procedures for project-level environmental decisionmaking. The audit team did not evaluate DOT&PF's project-specific decisions. The sampled files included CEs, Environmental Assessments (EA), and environmental reevaluations.

PAIR Review: The audit team reviewed DOT&PF's responses to the PAIR, which consisted of 28 questions about specific elements in the MOU that DOT&PF must implement. The audit team used these responses to develop specific follow-up questions for interviews with DOT&PF staff.

DOT&PF Self-Assessment Review: The audit team reviewed DOT&PF's December 2020 Self-Assessment Report and used it to develop specific follow-up questions for interviews with DOT&PF staff. The NEPA Assignment Program MOU Section 8.2.5, requires the DOT&PF to conduct annual self-assessments of its QA/QC procedures and performance.

Interviews: The audit team conducted interviews with 17 DOT&PF employees, including staff from each of DOT&PF's three regional offices and the Statewide Environmental Office (SEO). The audit team selected invited DOT&PF employees representing a diverse range of expertise, experience, and program responsibility to participate in interviews.

In addition, the audit team conducted interviews of two attorneys with the Alaska Department of Law and interviews with individuals at the Bureau of Land Management (BLM), the

United States Forest Service (USFS), and the State Historic Preservation Office (SHPO).

Policy/Guidance/Manual Review: Throughout the document reviews and interviews, the audit team verified information on DOT&PF's NEPA Assignment Program using DOT&PF policies, guidance, manuals, and reports. These included the Environmental Program Manual (EPM), the NEPA Assignment QA/QC Plan, the NEPA Assignment Program Training Plan, and the NEPA Assignment Self-Assessment Report.

Overall Audit Opinion

This report identifies four observations and three successful practices. The audit team finds DOT&PF is substantially in compliance with the provisions of the MOU, has carried out the environmental responsibilities it assumed through the NEPA Assignment Program, and has taken steps to address observations identified in the third audit.

Non-Compliance Observations

The audit team made no non-compliance observations in the fourth audit.

Observations and Successful Practices

This section summarizes the audit team's observations of DOT&PF's NEPA Assignment Program implementation and DOT&PF's successful practices. "Observations" are items the audit team would like to draw DOT&PF's attention to, which may benefit from revisions to improve processes, procedures, or outcomes, if such steps have not already been taken. "Successful practices" are those that FHWA would like to commend DOT&PF on developing. These may include ideas or concepts that DOT&PF has planned, but not yet implemented. Successful practices and observations are described under the six MOU topic areas: Program Management, Documentation and Records Management, QA/QC, Training, Performance Measures, and Legal Sufficiency.

This audit report provides an opportunity for DOT&PF to take further actions to improve their program. The FHWA will consider the status of areas identified for potential improvement in this audit's observations as part of the scope of future monitoring events. DOT&PF will continue to be able to describe program improvements in their annual Self-Assessment reports.

Program Management

Program Management includes the overall administration of the NEPA

Assignment Program. The audit team noted the following successful practices and observations related to Program Management.

Successful Practice #1: Business Program Management (BPM) System

Interviewees overwhelmingly responded positively to questions regarding the development and implementation of the BPM system. They acknowledged the efforts by the developers and SEO to include the following: virtual training sessions and demonstrations, creation of a user's manual, PowerPoint handouts, and beta testing with Regional Environmental Managers (REMs) to work through "bugs" in the system.

Observation #1: Permitting Dashboard Reporting Procedures

Section 5.1.1 of the MOU subjects DOT&PF to the same procedural requirements and substantive requirements that apply to the DOT Secretary including, but not limited to Federal statutes or FHWA policy. Per 23 U.S.C. 139 and the Memorandum from Deputy Assistant Secretary for Transportation Policy, Federal Permitting Dashboard Reporting Standard, December 28, 2018, EA and Environmental Impact Statement (EIS) project information is required to be entered in the Federal Infrastructure Permitting Dashboard (Dashboard). The Dashboard Reporting Standards require EIS's and EA's permitting timetables to be entered in the dashboard: (1) within 90 days after the issuance of a Notice of Intent for an EIS, or (2) the class of action determination for an EA initiated after June 2016. Based on interviews, only one project has been entered into the Dashboard, which FHWA verified. Based on DOT&PF records, three projects should have been entered into the Dashboard. The FHWA understands that DOT&PF does not have written procedures regarding how to carry out these responsibilities. Written procedures would provide opportunities for consistent, timely, and compliant reporting of the projects required to be in the Dashboard.

Documentation and Records Management

Documentation and Records Management includes maintaining project files and other recordkeeping (whether hardcopy or electronic) pertaining to the DOT&PF's discharge of the responsibilities it has assumed under the 23 U.S.C. 327 Program. From November 1, 2019, through October 31, 2020, DOT&PF made 228 project decisions. Through employing both

random and judgmental sampling procedures, the audit team identified 47 project decisions to review.

Successful Practice #2: Tracking

Interviews with Section 106 Professionally Qualified Individuals (PQI) revealed the use of an Excel database in at least one DOT&PF region to track and manage Section 106 information for projects. Tracking information on consultation letters, determinations of eligibility, effect findings, SHPO concurrence, etc. allows the PQI to stay on top of required tasks and ensure work is completed. Once Section 106 consultation is completed, the PQI enters this data into the SEO Access database tracking system that is used for the Section 106 Programmatic Agreement monitoring and annual reporting.

Observation #2: Documentation of Public and Agency Comments in CE

In 6 of 21 (28 percent) CE project files reviewed, there was inadequate documentation of public and/or agency comments and resolution of the comments. This is not in accordance with Chapter 4 of the DOT&PF Highway Preconstruction Manual, which requires that CE Forms "list the issues raised by the public and agencies and the manner in which they were resolved." In addition, this observation appears to be inconsistent with data reported in Section 9.2.2. (Maintain completeness and adequacy of documentation of SEO records for projects done under the program) of DOT&PF's 2020–2021 Self-Assessment Report.

Interview responses to questions about public involvement requirements for CEs varied. Some interviewees responded that they follow the guidance in the Environmental Procedures Manual. Several interviewees spoke to responding directly to commenters via emails or letters and the potential for controversy to affect the class of action decision. However, none specifically mentioned the need to document comments and/or controversy and DOT&PF's responses to them on the CE forms. The FHWA recommends that DOT&PF incorporate procedures for documenting public involvement for CEs when appropriate into the EPM.

Quality Assurance/Quality Control

Under Section 8.2.4 of the MOU, DOT&PF agreed to carry out regular QA/QC activities in accordance with the MOU and DOT&PF procedures established to implement the NEPA Assignment Program. Based on the information evaluated by the audit team, DOT&PF continues to carry out

regular QA/QC activities in accordance with the MOU. The FHWA believes the BPM system provides more opportunity to augment data collection and reporting for continued program improvement.

Observation #3: The State's Commitment of Adequate Resources and QA/QC Performance

Sections 4.2.1 and 4.2.2 of the MOU outline the requirements for the State's commitment of adequate resources to carry out NEPA Assignment successfully. Moderate to high staff turnover has been a recurring issue. This has been documented in Audit #1 report Observation #3 and Audit #2 report Observation #3. In the January 2020 Self-Assessment Report, DOT&PF acknowledged the issue and indicated that they will continue to track staffing impacts on the program through the QA/QC process. During Audit #4, FHWA documented comments from multiple DOT&PF staff in some of the regions concerning workload, staffing, and turnover issues affecting QA/QC processes and observed a downward trend in QA/QC performance (*i.e.*, more errors and omissions in NEPA approvals relative to the previous audit performance period). In addition, interviews with the SHPO suggested some of the Section 106 challenges, such as incomplete applications during Section 106 consultations, may be due to workload issues at DOT&PF. Despite these observations, FHWA found that DOT&PF's implementation of the 327 Program was in substantial compliance with the MOU. The FHWA encourages DOT&PF to continue to assess how workload, staffing, and turnover issues might affect the level of compliance with the 327 MOU, organizational performance for carrying out NEPA Assignment and overall program delivery, and consider using tools like the BPM system, resource sharing, increased use of consultants, and other approaches to help address workload and staffing issues raised by some regions as well as the QA/QC performance issues indicated in the most recent self-assessment and observed by the audit team.

Training

Under Sections 12.1 and 12.2 of the MOU, the DOT&PF committed to implementing training necessary to carry out the environmental responsibilities assumed under the NEPA Assignment Program. The DOT&PF also committed to assessing its need for training, developing a training plan, and updating the training plan on an annual basis.

Observation #4: Training Needs Assessment

Considering ongoing staff turnover, as discussed in Observation #3, FHWA encourages DOT&PF to conduct a detailed statewide training needs assessment of new environmental staff. This will help DOT&PF allocate resources more efficiently to identify skill and knowledge gaps. The FHWA also encourages DOT&PF to explore cross training opportunities with other agencies (e.g.: SHPO, BLM, USFS) and engage them in development of their annual training plan.

Performance Measures

The FHWA and DOT&PF mutually established a set of performance measures to evaluate DOT&PF's performance in assuming NEPA Assignment Program responsibilities. The DOT&PF continues to collect, maintain, and develop data towards monitoring its performance as required by Section 10.1.3 of the MOU. The audit team noted the following successful practice related to Performance Measures.

Successful Practice #3: Relationships With Agencies

The audit team found that DOT&PF has very good and positive relationships with BLM, USFS, and SHPO. The FHWA has interviewed resource agencies in previous audits and found that overall, they had good working relationships with DOT&PF. The audit team decided to interview staff from BLM and the USFS during Audit #4 since Federal Land Management Agencies had not been interviewed in past audits and they were included in DOT&PF's May 2020 agency poll. The audit team also chose to interview the SHPO since they had not been interviewed since Audit #1. The individuals interviewed from these three agencies indicated that overall, their working relationships with DOT&PF were very good and positive. This information correlates well with the overwhelmingly positive responses DOT&PF received to their agency poll.

Legal Sufficiency

Since 2017, the same attorney from the Alaska Attorney General's Office, Transportation Section, has been assigned to the NEPA Assignment Program. The assigned attorney has significant experience with Federal-aid highway projects and the Federal environmental process. The attorney works directly with DOT&PF staff on project environmental documents. Based on the interviews, the attorney becomes involved early in project

development, normally reviewing a NEPA document before receiving a formal request for a legal sufficiency review. During the audit period, the attorney did not review an EIS or a Section 4(f) evaluation requiring a legal sufficiency review. Although a legal sufficiency review is not required for EAs, the attorney reviewed two EAs during the audit period. The attorney reported that the review process for an EA is like the review process for an EIS. Department of Law Management stated during the interviews that while one attorney is currently assigned to the program, should workload increase significantly another attorney could be assigned to NEPA work or litigation, likely through the utilization of outside counsel per 23 U.S.C. 327(a)(2)(G).

The audit team finds that DOT&PF meets the legal sufficiency determination and staffing requirements set forth in the DOT&PF Environmental Procedures Manual.

Status of Observations From Audit #3 Report (April 2020)

This section describes the actions DOT&PF has taken in response to observations made during the third audit.

Observation #1: Self-Assessment Procedures

The DOT&PF's 2018 NEPA Assignment Program Self-Assessment Procedures require that SEO develop the preliminary and final Self-Assessment Report through coordination with, and input from, the REMs. During Audit #3 interviews, the audit team found that DOT&PF did not develop the January 2020 Self-Assessment Report in accordance with their procedures, nor distribute the final report to the regions. For Audit #4, DOT&PF indicated in their responses to the PAIR that the draft December 2020 Self-assessment was sent to the REMs for review and comment according to their procedures. Comments were received and addressed in the final Self-Assessment Report, which was then shared with the regions.

Observation #2: Assessing Resource Agency Communication

Section 10.2.1 C. of the MOU requires DOT&PF to "Assess change in communication among DOT&PF, Federal and State agencies, and the public resulting from assumption of responsibilities under this MOU". The MOU allows DOT&PF to determine the method it will use to assess this change. The DOT&PF selected to use an annual resource agency poll. The DOT&PF identified this measure in its DOT&PF NEPA Assignment Program Performance

Measures document located on its website. At the time of Audit #3, DOT&PF had not yet used a resource agency poll, and FHWA recommended that DOT&PF consider changing the method for reporting this measure.

In May 2020 (prior to Audit #4), DOT&PF conducted an agency survey to assess changes in communication among DOT&PF, State, and Federal resource agencies. As described in DOT&PF's Self-Assessment Report, the survey consisted of six questions distributed via an online platform to a representative cross section of State and Federal resource Agency staff. Twenty-four responses were received from 11 different resource agencies. The DOT&PF asked the question: "Has the level of communication improved, declined, or remained the same since the MOU became effective?" Eleven of the responses indicated that there had been an improvement in communication and the remaining responses indicated there had been no change.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA-2021-0020]

Surface Transportation Project Delivery Program; Arizona Department of Transportation FHWA Audit Report

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Moving Ahead for Progress in the 21st Century Act established the Surface Transportation Project Delivery Program that allows a State to assume FHWA's environmental responsibilities for environmental review, consultation, and compliance under the National Environmental Policy Act (NEPA) for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years of State participation to ensure compliance with program requirements. This is the second audit of the Arizona Department of Transportation's (ADOT) performance of its responsibilities under the Surface Transportation Project Delivery Program (NEPA Assignment Program). This

notice makes available the final second audit report for ADOT.

FOR FURTHER INFORMATION CONTACT: Ms. Colleen Vaughn, Office of Project Development and Environmental Review, (202) 633-0356, colleen.vaughn@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, or Ms. Michelle Andotra, Office of the Chief Counsel, (404) 562-3679, michelle.andotra@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 United States Code (U.S.C.) 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. The ADOT published its application for NEPA assumption on June 29, 2018, and solicited public comment. After considering public comments, ADOT submitted its application to FHWA on November 16, 2018. The application served as the basis for developing a memorandum of understanding (MOU) that identifies the responsibilities and obligations that ADOT would assume. The FHWA published a notice of the draft MOU in the **Federal Register** on February 11, 2019, at 84 FR 3275, with a 30-day comment period to solicit the views of the public and Federal agencies. After the close of the comment period, FHWA and ADOT considered comments and proceeded to execute the MOU. Effective April 16, 2019, ADOT assumed FHWA's responsibilities under NEPA, and the responsibilities for NEPA-related Federal environmental laws described in the MOU.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the MOU during each of the first 4 years of State participation and, after the fourth

year, monitor compliance. The FHWA must make the results of each audit available for public comment. The FHWA published a notice in the **Federal Register** at 87 FR 66357 on November 03, 2022, soliciting comments for 30 days pursuant to 23 U.S.C. 327(g). The FHWA received comments on the draft report from the American Road & Transportation Builders Association (ARTBA). The ARTBA's comments were supportive of the Surface Transportation Project Delivery Program and did not relate specifically to the audit. This notice makes available the final report of ADOT's second audit under the program. The final audit report is available for download at www.regulations.gov under FHWA-2021-0020.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

Shailen P. Bhatt,

Administrator, Federal Highway Administration.

Surface Transportation Project Delivery Program, FHWA Audit #2 of the Arizona Department of Transportation

Executive Summary

This report summarizes the results of the Federal Highway Administration's second audit of the Arizona Department of Transportation's (ADOT) assumption of National Environmental Policy Act (NEPA) responsibilities under the Surface Transportation Project Delivery Program. Under the authority of Title 23 United States Code (U.S.C.) Section 327, ADOT and the Federal Highway Administration (FHWA) executed a memorandum of understanding (MOU) on April 16, 2019, to memorialize ADOT's NEPA responsibilities and liabilities for Federal-aid highway projects and other related environmental reviews for highway projects in Arizona. This 23 U.S.C. 327 MOU covers environmental review responsibilities for projects that require the preparation of environmental assessments (EA), environmental impact statements (EIS), and non-designated individual categorical exclusions (CE). A separate MOU between FHWA and ADOT, pursuant to 23 U.S.C. 326, authorizes environmental review responsibilities for other CEs. This audit does not cover the CE responsibilities and projects assigned to ADOT under the 23 U.S.C. 326 MOU.

The FHWA conducted an audit of ADOT's performance according to the terms of the MOU from March 29 to April 1, 2021. Prior to the audit, the FHWA audit team reviewed ADOT's environmental manuals and procedures, NEPA project files, ADOT's response to FHWA's pre-audit information request (PAIR), and ADOT's NEPA Assignment Self-Assessment Report. During the March 2021 audit, the audit team conducted interviews with staff from ADOT Environmental Planning (EP) and the

Arizona Attorney General's Office (AGO) and prepared preliminary audit results. The audit team presented these preliminary results to ADOT EP leadership on April 1, 2021. The audit team conducted a completely virtual site visit rather than its traditional onsite visit due to national health emergency travel restrictions.

Overall, the audit team found that ADOT has carried out the responsibilities it has assumed consistent with the intent of the MOU and ADOT's application. The ADOT continues to develop, revise, and implement procedures and processes required to deliver its NEPA Assignment Program. This report describes several observations and successful practices. Through this report, FHWA is notifying ADOT of two non-compliance observations that require ADOT to take corrective action. By addressing the observations in this report, ADOT will continue to assure successful program assignment.

Background

The purpose of the audits performed under the authority of 23 U.S.C. 327 is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal statutes, regulations, policies, and guidance. The FHWA's review and oversight obligation entails the need to collect information to evaluate the success of the NEPA Assignment Program; to evaluate a State's progress toward achieving its performance measures as specified in the MOU; and to collect information for the administration of the NEPA Assignment Program. This report summarizes the results of the second audit in Arizona and ADOT's progress towards meeting the program review objectives identified in the MOU. Following this audit, FHWA will conduct two additional annual NEPA Assignment Program audits in Arizona.

Scope and Methodology

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). The definition of an audit is one where an independent, unbiased body makes an official and careful examination and verification of accounts and records, especially of financial accounts. Auditors who have special training with regard to accounts or financial records may follow a prescribed process or methodology in conducting an audit of those processes or methods. The FHWA considers its review to meet the definition of an audit because it is an unbiased, independent, official, and careful examination and verification of records and information about ADOT's assumption of environmental responsibilities.

The audit team consisted of NEPA subject matter experts from FHWA Headquarters, Resource Center, Office of the Chief Counsel, and staff from FHWA's Arizona Division. This audit is an unbiased official action taken by FHWA, which included an audit team of diverse composition, and followed an established process for developing the review report and publishing it in the **Federal Register**.

The audit team reviewed six NEPA Assignment Program elements: program

management; documentation and records management; quality assurance/quality control (QA/QC); performance measures; legal sufficiency; and training. The audit team considered two additional focus areas for this review: the procedures contained in 40 CFR part 93 for project-level conformity and the procedures contained in Section 4(f) of the U.S. Department of Transportation Act of 1966, codified in 49 U.S.C. 303 and 23 U.S.C. 138 (otherwise known as Section 4(f)). This report concludes with a status update for FHWA's observations from the first audit report.

The audit team conducted a careful examination of ADOT policies, guidance, and manuals pertaining to NEPA responsibilities, as well as a representative sample of ADOT's project files. Other documents, such as ADOT's PAIR responses and ADOT's Self-Assessment Report, also informed this review. In addition, the audit team interviewed ADOT staff via videoconference.

The timeframe defined for this second audit includes highway project environmental approvals completed between January 1 to December 31, 2020. During this timeframe, ADOT completed NEPA approvals and documented NEPA decision points for nine projects. Due to the small sample size, the audit team reviewed all nine projects. This consisted of three EAs with a Finding of No Significant Impact, two EAs initiated with scoping completed, three EA re-evaluations, and one individual CE.

The PAIR submitted to ADOT contained 24 questions covering all 6 NEPA Assignment Program elements. The audit team developed specific follow-up questions for the interviews with ADOT staff based on ADOT responses to the PAIR. The audit team conducted a total of 13 interviews. Interview participants included staff from ADOT EP and the Arizona AGO.

The audit team compared ADOT manuals and procedures to the information obtained during interviews and project file reviews to determine if ADOT's performance of its MOU responsibilities is in accordance with ADOT procedures and Federal requirements. The audit team documented individual observations and successful practices during the interviews and reviews and combined these under the six NEPA Assignment Program elements. The audit results are described below by program element.

Overall Audit Opinion

The audit team found ADOT has carried out the responsibilities it has assumed consistent with the intent of the MOU and ADOT's application. The FHWA is notifying ADOT of two non-compliance observations that require ADOT to take corrective action. By addressing the observations cited in this report, ADOT will continue to ensure a successful program.

Successful Practices and Observations

Successful practices are practices that the team believes are positive and encourages ADOT to consider continuing or expanding those programs in the future. The audit team identified numerous successful practices in this report.

Observations are items the audit team would like to draw ADOT's attention to,

which may improve processes, procedures, and/or outcomes. The team identified four observations in this report.

Non-compliance observations are instances where the audit team finds the State is not in compliance or is deficient with regard to a Federal regulation, statute, guidance, policy, State procedure, or the MOU. Non-compliance may also include instances where the State has failed to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities they have assumed. The FHWA expects the State to develop and implement corrective actions to address all non-compliance observations. The audit team identified two non-compliance observations in this report.

The audit team shared initial results during the closeout meeting with ADOT and shared the draft audit report with ADOT to provide them the opportunity to clarify any observation, as needed, and/or begin implementing corrective actions to improve the program. The FHWA will consider actions taken by ADOT to address these observations as part of the scope of the third audit.

Program Management

Successful Practice #1

The ADOT EP continues to maintain several guidance manuals for implementing NEPA Assignment and evaluating environmental resources. These manuals are readily available online at ADOT's environmental website. The ADOT continuously updates its manuals and ensures staff are informed of updates. Staff noted the benefit of utilizing the guidance manuals and having better defined procedures.

Successful Practice #2

During interviews with staff, the audit team learned that ADOT EP has increased internal communication and coordination by holding monthly meetings with the NEPA Assignment Program managers and technical area program managers, and by holding biweekly meetings with program managers. The ADOT EP's internal communication efforts also included emails and informal staff interactions.

Successful Practice #3

During interviews with staff, the audit team learned that staff felt a benefit of NEPA Assignment has been an increased sense of ownership and responsibility for the program and decisions. Program managers indicated that staff at all levels within ADOT had become more engaged in the NEPA Assignment Program.

Observations

Observation #1: Deficiencies and Gaps in ADOT's Manuals and Procedures

The audit team reviewed ADOT's manuals and procedures as part of the evaluation of ADOT's performance of its MOU responsibilities. Section 4.2.4 of the MOU specifies that ADOT must implement procedures to support appropriate environmental analysis and decisionmaking under NEPA and associated laws and regulations. The audit team identified the

following deficiencies in ADOT's manuals and procedures which may result in incomplete project documentation or analysis and increase the risk for non-compliance:

- The ADOT CE Checklist Manual and the ADOT EA/EIS Manual contain different procedures for completing re-evaluations and the process for re-evaluations for EA/EISs is not well-defined. During interviews, staff described variations in the procedures for completing and documenting re-evaluations.

- The ADOT Section 4(f) Manual, documentation forms, and desk reference/matrix contain information inconsistent with FHWA guidance and regulation, as identified below:

- The manual, desk reference/matrix, "Section 4(f) Applicability/Exceptions" form, and "No Section 4(f) Property/Use" form incorrectly state that the exception for archaeological sites applies only to Section 106 adverse effect findings. The archaeological exception can be applied to both no adverse effect and adverse effect findings. Moreover, resources resulting in either finding must still be evaluated for Section 4(f) applicability and potential uses. The incorrect information in ADOT's materials creates the risk of inadequately evaluating archaeological sites with a finding of no adverse effect for Section 4(f) purposes, and not consulting with the official with jurisdiction when the archaeological exception is applied.

- The manual, desk reference/matrix, and "No Section 4(f) Property/Use" form incorrectly state that a Section 106 no adverse effect finding equates to a Section 4(f) "no use." While it is possible for a Section 4(f) "no use" to apply in cases of no adverse effect findings, this is not automatic, and resources should be evaluated on an individual basis to determine potential uses. The project file should include information demonstrating that a "no use" determination is appropriate and the factors that support that decision. The incorrect information in ADOT's materials creates the risk of inadequately evaluating all eligible historic properties for potential uses.

- The "Section 4(f) *De Minimis* Impact on Public Parks, Recreational Areas and Wildlife/Waterfowl Refuges" form incorrectly indicates that meeting minutes alone can be used to document written concurrence from the official with jurisdiction. Meeting minutes can be used to demonstrate that communicating potential impacts and coordinating with the official with jurisdiction occurred, but written concurrence should be documented through formal correspondence (e.g., signed letter or form, or email responses).

Documentation and Records Management

Successful Practice #4

During interviews, staff indicated increased efforts to coordinate with the ADOT Communications Office and the ADOT Civil Rights Office on public involvement activities conducted for projects.

Successful Practice #5

The ADOT continues to implement its standard folder structure for consistent

record keeping and assistance with QA reviews. Staff commented that the standard folder structure was a helpful tool and improved the process for maintaining project files.

Successful Practice #6

The ADOT EP has developed standard templates (checklists, forms) for various decision points and processes. Staff noted that using the standard templates during the environmental review process has increased the consistency of project documentation.

Observations

Section 4.2.4 of the MOU specifies that ADOT must implement procedures to support appropriate environmental analysis and decisionmaking under NEPA and associated laws and regulations. The audit team identified several inconsistencies between ADOT's procedures for documenting project decisions (as identified in the ADOT CE Checklist Manual, ADOT EA/EIS Manual, ADOT Section 4(f) Manual, ADOT QA/QC Plan, and ADOT Project Development Procedures Manual) and the project file documentation provided. The ADOT was provided an opportunity during the audit, and during their opportunity to comment on the draft audit report, to clarify inconsistencies identified by the audit team and provide additional information regarding the project documentation. The ADOT provided explanations to the audit team's questions and indicated where specific information was located in the project files but did not submit additional documents or files. The FHWA did not consider this supplemental information to be sufficient for four audited projects.

Non-Compliance Observation #1: Deficiencies in Section 4(f) Evaluation of Archaeological resources

The ADOT's Section 4(f) Manual (Sections 3.3 and 3.4.2) and FHWA regulations, policies, and guidance provide information on determining the applicability of Section 4(f) to archaeological resources and determining if there is an exception or potential use. ADOT's Section 4(f) Manual (Sections 5.2 and 5.3) specifies procedures for documenting Section 4(f) uses of archaeological sites, exceptions per 23 CFR 774.13(b), and "no use" determinations. During Audit #1, FHWA identified inconsistencies with ADOT's Section 4(f) evaluation and documentation of archaeological sites which were included as an observation in the Audit #1 Report. The audit team observed similar inconsistencies during the project file reviews for this audit and identified the following procedural deficiencies relating to ADOT's Section 4(f) evaluation and documentation:

- One project file included a Section 106 adverse effect determination for two archaeological sites, indicating the presence of Section 4(f) resources and potential Section 4(f) uses. The consultation letter sent to the Arizona State Historic Preservation Officer did not state ADOT's intent to apply the archaeological exception to these sites or include other Section 4(f) information regarding these sites. No other consultation letters or other information were provided in

the project file or NEPA document as to how these two sites were evaluated for Section 4(f).

Non-Compliance Observation #2: Deficiencies in Analysis of Right-of-Way Impacts

The ADOT's procedures (ADOT EA/EIS Manual) and FHWA's regulations, policies, and guidance provide information on how to consider right-of-way impacts in the NEPA analysis. The FHWA's regulations, policies, and guidance provide additional information on how early property acquisitions should be considered with the right-of-way impacts analysis. After completing the project file review, the audit team identified the following procedural deficiencies relating to ADOT's evaluation of right-of-way impacts:

- One project file did not demonstrate that early acquisition of properties and previous relocations were adequately addressed in the impact analysis in the NEPA document. The NEPA document stated that ADOT had acquired properties within the project corridor during previous planning and environmental studies and that ADOT intended to incorporate these early acquisitions into the right-of-way needed for the current project. The CEs previously completed for some of these early acquisitions included a complete NEPA evaluation. However, several CEs previously completed for early acquisitions were only for title transfer of the properties (per 23 CFR 771.117(d)(12)) and did not evaluate demolition, relocations, or other potential environmental impacts. The audit team requested additional information from ADOT regarding the NEPA analysis of these properties. The ADOT responded that the project files and NEPA document contained a complete record and no additional documentation was available. Since the properties acquired as early acquisitions were incorporated into the right-of-way needed for the current project, these properties should have been included in the NEPA analysis, even though the properties were acquired during other planning and environmental studies. Based on the information provided in the project file and the NEPA document, it does not appear that all of the early acquisitions were fully evaluated in the NEPA analysis for the current project, nor were they accounted for in the total number of acquisitions required for the project (per 23 CFR 771.119(b)). The land use, environmental justice, community impacts, and indirect and cumulative impacts sections provided conflicting information regarding the impact analyses of these properties. Therefore, it is unclear how all the early property acquisitions were considered in the overall right-of-way impacts analysis in the NEPA evaluation.

Observation #2: Deficiencies in Section 4(f) Documentation of *de minimis* Impact to Historic Properties

The ADOT's procedures (ADOT Section 4(f) Manual Sections 5.1 and 5.4.2 and ADOT QA/QC Plan Section 5.1.1) specify completing the "Section 4(f) *De Minimis* Impact for Historic Properties Form" in addition to obtaining written concurrence from the official with jurisdiction.

After completing the project file review, the audit team found that two project files did not include the "Section 4(f) *De Minimis* Impact for Historic Properties Form" for *de minimis* impacts to historic properties.

Observation #3: Inconsistencies in Interagency Consultation Documentation

After completing the project file review, the audit team found several inconsistencies with ADOT's documentation of compliance with interagency consultation requirements (per 40 CFR 93.105). It is unclear if interagency consultation occurred for some projects since the project files did not include information on agency responses, concurrence, and the comment resolution process. Therefore, it is unknown if the interagency consultation agencies had an opportunity to participate in consultation or if ADOT provided them an opportunity to review and comment on the materials as required by 40 CFR 93.105 and MOU Section 7.2.1.

The audit team is aware that ADOT has increased efforts to follow up with agencies throughout interagency consultation and include email responses with consultation documentation and acknowledges ADOT's progress toward improving their processes.

Quality Assurance/Quality Control

The audit team verified that ADOT has procedures in place for QA/QC which are described in the ADOT QA/QC Plan and the ADOT Project Development Procedures. No observations were identified during this audit.

Performance Measures

Observations

Observation #4: Incomplete Development and Implementation of Performance Measures To Evaluate the Quality of ADOT's Program

The audit team reviewed ADOT's development and implementation of performance measures to evaluate their program as required in the MOU (Part 10.2.1). The ADOT's QA/QC Plan, PAIR response, and self-assessment report identified several performance measures, but all included limited reporting data for the review period. The ADOT's reporting data primarily dealt with increasing efficiencies and reducing project delivery schedules rather than on measuring the quality of relationships with agencies and the general public, and decisions made during the NEPA process. The metrics ADOT has developed are not being utilized to provide a meaningful or comprehensive evaluation of the overall program. In addition, ADOT's performance measures indicate a disconnect between its metrics and availability of reportable data. Staff indicated during interviews that performance measures are not an effective or useful tool in evaluating the program.

Legal Sufficiency

Through information provided by ADOT and interviews by the FHWA Office of Chief Counsel with two Assistant Attorneys General (AAG) assigned to ADOT's NEPA Assignment Program, the auditors

determined ADOT had not completed formal legal sufficiency reviews of assigned environmental documents during the audit period. Currently, ADOT retains the services of two AAGs for NEPA Assignment reviews and related matters. The assigned AAGs have received formal and informal training in environmental law matters.

Successful Practice #7

Through the interviews, the audit team learned ADOT seeks to involve its lawyers early in the environmental review phase, with AAGs participating in project coordination team meetings and reviews of early drafts of environmental documents. The AAGs will provide legal guidance at any time ADOT requests it throughout the project development process. For formal legal sufficiency reviews, the process includes a submittal package containing a request for legal sufficiency review. A letter finding of legal sufficiency would be included in the project file.

Training

The audit team reviewed ADOT's 2021 Training Plan and ADOT's PAIR responses pertaining to its training program. The ADOT continues to maintain a strong training program by providing training opportunities to staff and dedicating time, effort, and resources toward its training program. To further support the training program, ADOT EP employs a dedicated training coordinator within the environmental section.

Successful Practice #8

During staff interviews, the audit team learned that the staff provides input on the training plan and that program managers meet quarterly to discuss training needs. Staff remarked on the availability of training offered to them and considered this to be a benefit to ADOT's NEPA Assignment Program. The audit team commends ADOT for adjusting to a virtual environment and offering online training opportunities for staff.

Status of Observations From the Audit #1 Report

This section describes the actions ADOT has taken (or is taking) in response to observations made during the first audit.

Non-Compliance Observation #1: Incomplete Project Files Submission

During Audit #1, ADOT submitted incomplete project files to FHWA by not uploading all files requested by FHWA to the file sharing website. For Audit #2, ADOT provided FHWA direct access to the project files requested for the project file review. The ADOT has stated it intends to continue to utilize this method for sharing files with FHWA. The ADOT also indicated it will continue to identify improvements in technology to increase efficiencies in file sharing. The FHWA appreciates ADOT's efforts towards increasing the transparency and communication during the audit process, and better utilizing available technologies.

Non-Compliance Observation #2: Project-Level Conformity Compliance Issues

During Audit #1, the audit team found that ADOT's protocols do not provide for the

appropriate consultation, coordination, and communication with FHWA and other agencies to ensure the projects meet the project-level conformity requirements where required. The audit team found documentation for two projects showing that ADOT staff did not coordinate with FHWA on the application of conformity requirements and found multiple projects that did not demonstrate ADOT's compliance with interagency consultation requirements (per 40 CFR 93.105). As part of Audit #2, the audit team learned that ADOT has made progress toward addressing these issues. The ADOT and FHWA established a joint working group that resulted in developing draft coordination procedures and identifying increased communication methods, including monthly coordination meetings. During the file review for Audit #2, the audit team identified additional inconsistencies in the project files as described in the observations above. The FHWA recognizes ADOT's efforts toward improving its procedures and will continue to evaluate this area in subsequent audits.

Observation #1: Use of the Federal Infrastructure Permitting Dashboard

The ADOT is responsible for inputting project information for assigned projects into the Federal Infrastructure Permitting Dashboard, per MOU Section 8.5.1 and in accordance with the Federal Permitting Dashboard Reporting Standard. During Audit #1, the audit team found that the dashboard did not include information for any of the applicable projects assigned to ADOT. The ADOT has since obtained access to the dashboard, designated staff responsible for entering project data, and has updated the dashboard with relevant project information.

Observation #2: Inconsistencies and Deficiencies Based on the Review of Project File Documentation

After completing the project file review for Audit #1, the audit team identified several procedural deficiencies relating to the MOU, ADOT's procedures, and FHWA's regulations, policies, and guidance. To address this issue, ADOT has developed standard templates (forms, checklists) to increase consistency in project file documentation and has informed staff of documentation requirements. The audit team identified additional procedural deficiencies during Audit #2 as identified in the observations described above. The FHWA recognizes ADOT's efforts toward improving its procedures and will continue to evaluate this area in subsequent audits.

Observation #3: Incomplete Development and Implementation of Performance Measures

During Audit #1, the audit team reviewed ADOT's development and implementation of performance measures to evaluate their program as required in the MOU (Part 10.2.1). The Self-Assessment Report did not include reporting data for any of the performance measures. Due to the lack of performance measure data, the audit team determined that ADOT had not fully established and initiated data collection as it relates to performance metrics per the MOU.

For Audit #2, the audit team reviewed ADOT's performance measures and reporting data submitted for the review period. The ADOT has made progress toward developing and implementing its performance measures, though FHWA continues to identify this program objective as an area of concern, described in the observations above, and will continue to evaluate this area in subsequent audits.

Response to Public Comments on the Draft Report and the Final Report

The FHWA received one comment applicable to the draft audit report, pursuant to 23 U.S.C. 327(g)(2). The American Road & Transportation Builders Association (ARTBA) commented that they are in general support of ADOT's implementation of the NEPA Assignment Program to accelerate Federal-aid highway program and project delivery in Arizona. The FHWA appreciates ARTBA's input.

After reviewing the public comments, FHWA determined that there is no need to revise the draft audit report. Therefore, FHWA is finalizing ADOT's second NEPA Assignment audit report with this **Federal Register** notice.

[FR Doc. 2023–19704 Filed 9–12–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0037]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of denials.

SUMMARY: FMCSA announces its decision to deny applications from 32 individuals who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a commercial motor vehicle (CMV) from operating CMVs in interstate commerce.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, fmcamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing material in the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:**I. Public Participation****A. Comments**

To view comments go to www.regulations.gov. Insert the docket number (FMCSA–2023–0037) in the keyword box, and click “Search.” Next, choose the only notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

FMCSA received applications from 32 individuals who requested an exemption from the FMCSRs prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a CMV from operating CMVs in interstate commerce.

FMCSA has evaluated the eligibility of these applicants and concluded that granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8).

III. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-

year period to align with the maximum duration of a driver's medical certification. The Agency's decision regarding these exemption applications is based on the eligibility criteria, the terms and conditions for Federal exemptions, and an individualized assessment of each applicant's medical information provided by the applicant.

IV. Conclusion

The Agency has determined that these applicants do not satisfy the eligibility criteria or meet the terms and conditions of the Federal exemption and granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8). Therefore, the 32 applicants in this notice have been denied exemptions from the physical qualification standards in § 391.41(b)(8).

Each applicant has, prior to this notice, received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final action by the Agency. This notice summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denial.

The following 32 applicants do not meet the minimum time requirement for being seizure-free, either on or off of anti-seizure medication:

Domingo Alcantar (TX)
 Scott Anderson (SC)
 Jesse Bailey (CO)
 Lennie Beaudoin (NH)
 Ricky Bloesser (KS)
 Zarie Bowman (NJ)
 Tarrah Bubenik (CA)
 Fedor Bulat (WI)
 Jack Butler (FL)
 Austin Clark (SC)
 Blake Derosier (MN)
 Elisa Diaz (CO)
 Jose Diaz Bartolo (CA)
 Paul Fuge (PA)
 Walter Grayer (AL)
 Mark Hejl (TX)
 Morgan Janisse (ID)
 Stephen Johnson (MO)
 Michael Karnatz (WI)
 Phillip Knight (TX)
 William London (CA)
 Jerry Martin (OH)
 Alan Murry (NE)
 Naomi Nordman (CA)
 Coltan Peterson (MN)
 Kalob Rickards (DE)
 James Roark (NM)
 Richard Sievers (WI)
 Jeremy Steele (DE)
 Hunter Stetz (NH)

Edward Stuart (PA)
 Ethan Vandehey (WI)

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–19755 Filed 9–12–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA–2012–0154; FMCSA–2013–0124; FMCSA–2014–0385; FMCSA–2016–0002; FMCSA–2018–0138, FMCSA–2020–0027]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for seven individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on August 13, 2023. The exemptions expire on August 13, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, fmcsamedical@dot.gov. Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:**I. Public Participation****A. Viewing Comments**

To view comments go to www.regulations.gov. Insert the docket number (FMCSA–2012–0154, FMCSA–2013–0124, FMCSA–2014–0385, FMCSA–2016–0002, FMCSA–2018–0138, or FMCSA–2020–0027) in the keyword box and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New

Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

On August 3, 2023, FMCSA published a notice announcing its decision to renew exemptions for seven individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (88 FR 51392). The public comment period ended on September 5, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based upon its evaluation of the seven renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the hearing requirement in § 391.41 (b)(11).

As of August 13, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (88 FR 51393):

Jason Clark (MO)
Timothy Finley (CA)
William Jones (MN)
David Presley (TX)
Michael Smith (CO)
Donald Taylor (NC)
Holly Wright, Jr. (NC)

The drivers were included in docket numbers FMCSA–2012–0154, FMCSA–2013–0124, FMCSA–2014–0385, FMCSA–2016–0002, FMCSA–2018–0138, or FMCSA–2020–0027. Their exemptions were applicable as of August 13, 2023 and will expire on August 13, 2025.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136, 49 U.S.C. chapter 313, or the FMCSRs.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–19753 Filed 9–12–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0036]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 12 individuals for an exemption from the prohibition in the

Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before October 13, 2023.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2023–0036 using any of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov, insert the docket number (FMCSA–2023–0036) in the keyword box and click “Search.” Next, choose the only notice listed, and click on the “Comment” button. Follow the online instructions for submitting comments.

- **Mail:** Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590–0001.

- **Hand Delivery:** West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays.

- **Fax:** (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the “Public Participation” portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, fmcamedical@dot.gov. Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2023–0036), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and

material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2023-0036/document>. Next, choose the only notice listed, click the "Comment" button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA–2023–0036) in the keyword box and click "Search." Next, choose the only notice listed, and click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or

greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The 12 individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The criteria states that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the ME in consultation with the treating physician. Before certification is considered, it is suggested that a 6-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver has had a seizure or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has

recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication, and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5-year period or more.

As a result of MEs misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified ME based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a notice of final disposition titled, "Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders," (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." Since that time, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in § 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (78 FR 3069).

III. Qualifications of Applicants

Colton Braun

Colton Braun is a 27-year-old class DM license holder in Illinois. They have a history of epilepsy and have been seizure free since February 2014. They take anti-seizure medication with the dosage and frequency remaining the same since 2013. Their physician states that they are supportive of Colton Braun receiving an exemption.

Adam Brunson

Adam Brunson is a 50-year-old class AM commercial driver's license (CDL) holder in Alabama. They have a history of seizure disorder and have been seizure free since 2010. They take anti-

¹ These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy*: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

seizure medication with the dosage and frequency remaining the same since 2021. Their physician states that they are supportive of Adam Brunson receiving an exemption.

Alan Glinsmann

Alan Glinsmann is a 65-year-old class AM CDL holder in Kansas. They have a history of post traumatic seizures and have been seizure free since January 1981. They take anti-seizure medication with the dosage and frequency remaining the same since 1983. Their physician states that they are supportive of Alan Glinsmann receiving an exemption.

Alex Hunter

Alex Hunter is a 61-year-old class 1 license holder in South Dakota. They have a history of generalized idiopathic epilepsy and have been seizure free since January 2015. They take anti-seizure medication with the dosage and frequency remaining the same since 2018. Their physician states that they are supportive of Alex Hunter receiving an exemption.

Kyle Jones

Kyle Jones is a 54-year-old class A CDL holder in Indiana. They have a history of seizure disorder and have been seizure free since 2012. They have not taken anti-seizure medication since 2014. Their physician states that they are supportive of Kyle Jones receiving an exemption.

Ryan McKnelly

Ryan McKnelly is a 45-year-old class A CDL holder in South Dakota. They have a history of generalized idiopathic epilepsy and have been seizure free since 2001. They take anti-seizure medication with the dosage and frequency remaining the same since 2003. Their physician states that they are supportive of Ryan McKnelly receiving an exemption.

Alfonso V. Mendoza

Alfonso V. Mendoza is a 33-year-old class C license holder in California. They have a history of seizure disorder and have been seizure free since December 2008. They take anti-seizure medication with the dosage and frequency remaining the same since 2008. Their physician states that they are supportive of Alfonso V. Mendoza receiving an exemption.

Jerrid Pace

Jerrid Pace is a 33-year-old class A CDL holder in Tennessee. They have a history of complex partial seizure and have been seizure free since 2015. They

take anti-seizure medication with the dosage and frequency remaining the same since 2013. Their physician states that they are supportive of Jerrid Pace receiving an exemption.

Elsa Santo

Elsa Santo is a 62-year-old class B license holder in New Jersey. They have a history of epilepsy and have been seizure free since May 2015. They take anti-seizure medication with the dosage and frequency remaining the same since November 2015. Their physician states that they are supportive of Elsa Santo receiving an exemption.

Brandon Schindele

Brandon Schindele is a 39-year-old class D license holder in Minnesota. They have a history of seizure disorder and have been seizure free since 1995. They take anti-seizure medication with the dosage and frequency remaining the same since 1993. Their physician states that they are supportive of Brandon Schindele receiving an exemption.

Travis Stevens

Travis Stevens is a 33-year-old class 0 license holder in Michigan. They have a history of grand mal epilepsy and have been seizure free since August 2008. They take anti-seizure medication with the dosage and frequency remaining the same since August 2013. Their physician states that they are supportive of Travis Stevens receiving an exemption.

Brad Wetli

Brad Wetli is a 44-year-old class A CDL holder in Indiana. They have a history of seizure disorder and have been seizure free since 1997. They take anti-seizure medication with the dosage and frequency remaining the same since 1997. Their physician states that they are supportive of Brad Wetli receiving an exemption.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023-19754 Filed 9-12-23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Federal Motor Vehicle Theft Prevention Standard; Nissan North America, Inc.

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This document grants in full the Nissan North America, Inc.'s (Nissan) petition for exemption from the Federal Motor Vehicle Theft Prevention Standard (theft prevention standard) for its Z vehicle line beginning in model year (MY) 2024. The petition is granted because the agency has determined that the antitheft device to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard. Nissan also requested confidential treatment for specific information in its petition. Therefore, no confidential information provided for purposes of this notice has been disclosed.

DATES: The exemption granted by this notice is effective beginning with the 2024 model year.

FOR FURTHER INFORMATION CONTACT: Carlita Ballard, Office of International Policy, Fuel Economy, and Consumer Programs, NHTSA, West Building, W43-439, NRM-310, 1200 New Jersey Avenue SE, Washington, DC 20590. Ms. Ballard's phone number is (202) 366-5222. Her fax number is (202) 493-2990.

SUPPLEMENTARY INFORMATION: Under 49 U.S.C. chapter 331, the Secretary of Transportation (and the National Highway Traffic Safety Administration (NHTSA) by delegation) is required to promulgate a theft prevention standard to provide for the identification of certain motor vehicles and their major replacement parts to impede motor vehicle theft. NHTSA promulgated regulations at 49 CFR part 541 (theft prevention standard) to require parts-marking for specified passenger motor vehicles and light trucks. Pursuant to 49 U.S.C. 33106, manufacturers that are subject to the parts-marking requirements may petition the Secretary of Transportation for an exemption for a line of passenger motor vehicles equipped with an antitheft device as standard equipment that the Secretary decides is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements. In accordance

with this statute, NHTSA promulgated 49 CFR part 543, which establishes the process through which manufacturers may seek an exemption from the theft prevention standard.

49 CFR 543.5 provides general submission requirements for petitions and states that each manufacturer may petition NHTSA for an exemption of one vehicle line per model year. Among other requirements, manufacturers must identify whether the exemption is sought under section 543.6 or section 543.7. Under section 543.6, a manufacturer may request an exemption by providing specific information about the antitheft device, its capabilities, and the reasons the petitioner believes the device to be as effective at reducing and deterring theft as compliance with the parts-marking requirements. Section 543.7 permits a manufacturer to request an exemption under a more streamlined process if the vehicle line is equipped with an antitheft device (an “immobilizer”) as standard equipment that complies with one of the standards specified in that section.¹

Section 543.8 establishes requirements for processing petitions for exemption from the theft prevention standard. As stated in section 543.8(a), NHTSA processes any complete exemption petition. If NHTSA receives an incomplete petition, NHTSA will notify the petitioner of the deficiencies. Once NHTSA receives a complete petition the agency will process it and, in accordance with section 543.8(b), will grant the petition if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541.

Section 543.8(c) requires NHTSA to issue its decision either to grant or to deny an exemption petition not later than 120 days after the date on which

a complete petition is filed. If NHTSA does not make a decision within the 120-day period, the petition shall be deemed to be approved and the manufacturer shall be exempt from the standard for the line covered by the petition for the subsequent model year.² Exemptions granted under part 543 apply only to the vehicle line or lines that are subject to the grant and that are equipped with the antitheft device on which the line’s exemption was based, and are effective for the model year beginning after the model year in which NHTSA issues the notice of exemption, unless the notice of exemption specifies a later year.

Sections 543.8(f) and (g) apply to the manner in which NHTSA’s decisions on petitions are to be made known. Under section 543.8(f), if the petition is sought under section 543.6, NHTSA publishes a notice of its decision to grant or deny the exemption petition in the **Federal Register** and notifies the petitioner in writing. Under section 543.8(g), if the petition is sought under section 543.7, NHTSA notifies the petitioner in writing of the agency’s decision to grant or deny the exemption petition.

This grant of petition for exemption considers Nissan Motor North America, Inc.’s (Nissan) petition for its Z vehicle line beginning in MY 2024. Based on the information provided in Nissan’s petition, NHTSA has determined that the antitheft device to be placed on its vehicle line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard.

I. Specific Petition Content Requirements Under 49 CFR 543.6

Pursuant to 49 CFR part 543, *Exemption from Vehicle Theft Prevention*, Nissan petitioned for an exemption for its specified vehicle line from the parts-marking requirements of the theft prevention standard, beginning in MY 2024. Nissan petitioned under 49 CFR 543.6, *Petition: Specific content requirements*, which, as described above, requires manufacturers to provide specific information about the antitheft device installed as standard equipment on all vehicles in the line for which an exemption is sought, the antitheft device’s capabilities, and the reasons the petitioner believes the device to be as effective at reducing and deterring theft as compliance with the parts-marking requirements.

More specifically, section 543.6(a)(1) requires petitions to include a statement

that an antitheft device will be installed as standard equipment on all vehicles in the line for which the exemption is sought. Under section 543.6(a)(2), each petition must list each component in the antitheft system, and include a diagram showing the location of each of those components within the vehicle. As required by section 543.6(a)(3), each petition must include an explanation of the means and process by which the device is activated and functions, including any aspect of the device designed to: (1) facilitate or encourage its activation by motorists; (2) attract attention to the efforts of an unauthorized person to enter or move a vehicle by means other than a key; (3) prevent defeating or circumventing the device by an unauthorized person attempting to enter a vehicle by means other than a key; (4) prevent the operation of a vehicle which an unauthorized person has entered using means other than a key; and (5) ensure the reliability and durability of the device.³

In addition to providing information about the antitheft device and its functionality, petitioners must also submit the reasons for their belief that the antitheft device will be effective in reducing and deterring motor vehicle theft, including any theft data and other data that are available to the petitioner and form a basis for that belief,⁴ and the reasons for their belief that the agency should determine that the antitheft device is likely to be as effective as compliance with the parts-marking requirements of part 541 in reducing and deterring motor vehicle theft. In support of this belief, the petitioners should include any statistical data that are available to the petitioner and form the basis for the petitioner’s belief that a line of passenger motor vehicles equipped with the antitheft device is likely to have a theft rate equal to or less than that of passenger motor vehicles of the same, or a similar, line which have parts marked in compliance with part 541.⁵

The following sections describe Nissan’s petition information provided pursuant to 49 CFR part 543, *Exemption from Vehicle Theft Prevention*. To the extent that specific information in Nissan’s petition is subject to a properly filed confidentiality request, that information was not disclosed as part of this notice.⁶

¹ 49 CFR 543.7 specifies that the manufacturer must include a statement that their entire vehicle line is equipped with an immobilizer that meets one of the following standards:

(1) The performance criteria (subsections 8 through 21) of C.R.C., c. 1038.114, *Theft Protection and Rollaway Prevention* (in effect March 30, 2011), as excerpted in appendix A of [part 543];

(2) National Standard of Canada CAN/ULC–S338–98, *Automobile Theft Deterrent Equipment and Systems: Electronic Immobilization* (May 1998);

(3) United Nations Economic Commission for Europe (UN/ECE) Regulation No. 97 (ECE R97), Uniform Provisions Concerning Approval of Vehicle Alarm System (VAS) and Motor Vehicles with Regard to Their Alarm System (AS) in effect August 8, 2007; or

(4) UN/ECE Regulation No. 116 (ECE R116), *Uniform Technical Prescriptions Concerning the Protection of Motor Vehicles Against Unauthorized Use* in effect on February 10, 2009.

² 49 U.S.C. 33106(d).

³ 49 CFR 543.6(a)(3).

⁴ 49 CFR 543.6(a)(4).

⁵ 49 CFR 543.6(a)(5).

⁶ 49 CFR 512.20(a).

II. Nissan's Petition for Exemption

In a petition dated November 17, 2022, Nissan requested an exemption from the parts-marking requirements of the theft prevention standard for the Z vehicle line beginning with MY 2024.

In its petition, Nissan provided a detailed description and diagram of the identity, design, and location of the components of the antitheft device for the Z vehicle line. Nissan stated that its MY 2024 Z vehicle line will be installed with a passive, electronic engine immobilizer device as standard equipment, as required by 543.6(a)(1). Key components of the antitheft device include an engine immobilizer, immobilizer control (CONT ASSY—SMART KEYLESS), engine control module (ECM), body control module, immobilizer antenna and a key FOB with a pre-registered key-ID microchip.

Pursuant to Section 543.6(a)(3), Nissan explained that activation of its immobilizer device occurs automatically when the ignition switch is turned to the "OFF" position. Nissan also stated that the immobilizer device prevents normal operation of the vehicle without using a special key. Nissan explained that when the brake SW or clutch is on and the key FOB is near the engine start switch, the BMC scans the Key-ID via the immobilizer ANT. The microchip then transmits the key-ID via radio wave. Next, the key-ID is received by the antenna and is amplified and transmitted to the BMC. Nissan further stated that the ECM will "request" the BCM to start the encrypted communication, and once the code is accepted, the BCM will send an OK-code and an encrypted code to the ECM. If the code is not accepted, the immobilizer control unit will send a NG-code. Nissan stated that the ECM will only stop the motor if it receives a NG-code from the BCM, the encrypted code is not correct, or no signal is received from the BCM.

As required in section 543.6(a)(3)(v), Nissan provided information on the reliability and durability of its proposed device. Nissan stated that its antitheft device is tested for specific parameters to ensure its reliability and durability. Nissan provided a detailed list of the tests conducted and believes that the device is reliable and durable since the device complied with its specified requirements for each test. Nissan stated that its immobilizer device satisfies the European Directive ECE R116, including tamper resistance. Nissan further stated that all control units for the device are located inside the vehicle, providing further protection from unauthorized accessibility of the device from outside

the vehicle. Nissan also stated that if a potential intruder were to damage the immobilizer system, it is designed so that the motor cannot be restarted and that the motor will restart only after transmission of the correct Key-ID and encrypted code are accepted. Nissan also stated that if an intruder were to substitute another immobilizer unit, the vehicle would still not be operable since the immobilizer and ECM are code-paired.

Nissan stated that the proposed device is functionally equivalent to the antitheft device installed on the MY 2011 Nissan Cube vehicle line which was granted a parts-marking exemption by the agency on April 14, 2010 (75 FR 19458). The agency notes that the theft rates for the Nissan Cube using an average of 3 MYs data (2012–2014), are 0.3322, 0.6471 and 2.0373 per thousand vehicles produced, respectively. For reference, the theft rate for MY 2014 passenger vehicles stolen in calendar year 2014 is 1.1512 thefts per thousand vehicles produced (82 FR 28246).

Nissan also referenced the National Insurance Crime Bureau's data which it stated showed a 70% reduction in theft when comparing MY 1997 Ford Mustangs (with a standard immobilizer) to MY 1995 Ford Mustangs (without an immobilizer). Nissan also referenced the Highway Loss Data Institute's data which reported that BMW vehicles experienced theft loss reductions resulting in a 73% decrease in relative claim frequency and a 78% lower average loss payment per claim for vehicles equipped with an immobilizer. Additionally, Nissan stated that theft rates for its Pathfinder vehicle line experienced reductions from model year (MY) 2000 to 2001 and subsequent years with implementation of an engine immobilizer device as standard equipment. Specifically, Nissan stated that the agency's theft rate data for MY's 2001 through 2005 reported theft rates of 1.9146, 1.8011, 1.1482, 0.8102, and 1.7298 respectively for the Nissan Pathfinder.

Nissan compared its device to other similar devices previously granted exemptions by the agency. Specifically, it referenced the agency's grant of full exemptions to General Motors Corporation for its Buick Riviera and Oldsmobile Aurora vehicle lines (58 FR 44872, August 25, 1993) and its Cadillac Seville vehicle line (62 FR 20058, April 24, 1997) from the parts-marking requirements of the theft prevention standard. Nissan stated that it believes that since its device is functionally equivalent to other comparable manufacturers' devices that have already been granted parts-marking

exemptions by the agency, along with the evidence of reduced theft rates for vehicle lines equipped with similar devices and advanced technology of transponder electronic security, the Nissan immobilizer device will have the potential to achieve the level of effectiveness equivalent to those vehicles already exempted by the agency.

III. Decision To Grant the Petition

Pursuant to 49 U.S.C. 33106 and 49 CFR 543.8(b), the agency grants a petition for exemption from the parts-marking requirements of part 541, either in whole or in part, if it determines that, based upon substantial evidence, the standard equipment antitheft device is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of part 541, or deemed approved under 49 U.S.C. 33106(d). As discussed above, in this case, Nissan's petition is granted under 49 U.S.C. 33106(d).

This conclusion is based on the information Nissan provided about its antitheft device. NHTSA believes, based on Nissan's supporting evidence, the antitheft device described for its vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard.

The agency concludes that Nissan's antitheft device will provide four of the five types of performance features listed in section 543.6(a)(3)⁷: promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device. However, the agency wishes to note that the Z line will not provide any visible or audible indication of unauthorized vehicle entry (*i.e.*, flashing lights and horn alarm).

The agency notes that 49 CFR part 541, Appendix A–1, identifies those lines that are exempted from the theft prevention standard for a given model year. 49 CFR 543.8(f) contains publication requirements incident to the disposition of all part 543 petitions. Advanced listing, including the release of future product nameplates, the

⁷ See, *e.g.*, 70 FR 74107 (Dec. 14, 2005). NHTSA has previously concluded that the lack of a visual or audio alarm has not prevented some antitheft devices from being effective protection against theft, where the theft data indicate a decline in theft rates for vehicle lines that have been equipped with devices similar to that what the petitioner is proposing to use.

beginning model year for which the petition is granted and a general description of the antitheft device is necessary in order to notify law enforcement agencies of new vehicle lines exempted from the parts-marking requirements of the theft prevention standard.

If Nissan decides not to use the exemption for its requested vehicle line, the manufacturer must formally notify the agency. If such a decision is made, the line must be fully marked as required by 49 CFR 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if Nissan wishes in the future to modify the device on which the exemption is based, the company may have to submit a petition to modify the exemption. Section 543.8(d) states that a part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the antitheft device on which the line's exemption is based. Further, section 543.10(c)(2) provides for the submission of petitions "to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in the exemption."⁸

The agency wishes to minimize the administrative burden that section 543.10(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be de minimis. Therefore, NHTSA suggests that if Nissan contemplates making any changes, the effects of which might be characterized as de minimis, it should consult the agency before preparing and submitting a petition to modify.

For the foregoing reasons, the agency hereby grants in full Nissan's petition for exemption for the Z vehicle line from the parts-marking requirements of 49 CFR part 541, beginning with its MY 2024 vehicles.

⁸ The agency wishes to minimize the administrative burden that section 543.10(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be de minimis. Therefore, NHTSA suggests that if a manufacturer with an exemption contemplates making any changes, the effects of which might be characterized as de minimis, it should consult the agency before preparing and submitting a petition to modify.

Issued under authority delegated in 49 CFR 1.95 and 501.8.

Milton E. Cooper,

Acting Associate Administrator for Rulemaking.

[FR Doc. 2023-19761 Filed 9-12-23; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC-OCC-2023-0014]

Mutual Savings Association Advisory Committee; Meeting

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The OCC announces a meeting of the Mutual Savings Association Advisory Committee (MSAAC).

DATES: A public meeting of the MSAAC will be held on Tuesday, October 3, 2023, beginning at 8:30 a.m. Eastern Daylight Time (EDT). The meeting will be in person and virtual.

ADDRESSES: The OCC will host the October 3, 2023 meeting of the MSAAC at the OCC's offices at 400 7th Street SW, Washington, DC 20219 and virtually.

FOR FURTHER INFORMATION CONTACT:

Michael R. Brickman, Deputy Comptroller for Specialty Supervision, (202) 649-5420, Office of the Comptroller of the Currency, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services. You also may access prior MSAAC meeting materials on the MSAAC page of the OCC's website.¹

SUPPLEMENTARY INFORMATION: Under the authority of the Federal Advisory Committee Act (the Act), 5 U.S.C. 1001 *et seq.*, and the regulations implementing the Act at 41 CFR part 102-3, the OCC is announcing that the MSAAC will convene a meeting on Tuesday, October 3, 2023. The meeting is open to the public and will begin at 8:30 a.m. EDT. The purpose of the meeting is for the MSAAC to advise the OCC on regulatory or other changes the OCC may make to ensure the health and viability of mutual savings associations.

¹ <https://occ.gov/topics/supervision-and-examination/bank-management/mutual-savings-associations/mutual-savings-association-advisory-committee.html>.

The agenda includes a discussion of current topics of interest to the industry.

Members of the public may submit written statements to the MSAAC. The OCC must receive written statements no later than 5:00 p.m. EDT on Thursday, September 28, 2023. Members of the public may submit written statements to MSAAC@occ.treas.gov.

Members of the public who plan to attend the meeting should contact the OCC by 5:00 p.m. EDT on Thursday, September 28, 2023, to inform the OCC of their desire to attend the meeting and whether they will attend in person or virtually, and to obtain information about participating in the meeting. Members of the public may contact the OCC via email at MSAAC@OCC.treas.gov or by telephone at (202) 649-5420. Attendees should provide their full name, email address, and organization, if any. For persons who are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to arrange telecommunications relay services for this meeting.

Michael J. Hsu,

Acting Comptroller of the Currency.

[FR Doc. 2023-19732 Filed 9-12-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Privacy Act of 1974; System of Records

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, FinCEN is proposing to establish a new system of records titled Treasury/FinCEN .004 for information collected by FinCEN in connection with the implementation of the Corporate Transparency Act (CTA). The CTA requires certain entities to report to FinCEN identifying information associated with the entities themselves, their beneficial owners, and their company applicants (together, beneficial ownership information or BOI). The CTA also authorizes FinCEN to disclose BOI to authorized recipients, subject to strict protocols on security and confidentiality.

DATES: This action will be effective without further notice on October 13, 2023 unless it is modified in response to comments. Comments must be submitted by [the aforementioned date].

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183.

All comments received, including attachments and other supporting documents, are part of the public records and subject to public disclosure. All comments received will be posted without change to www.regulations.gov, including any personal information provided. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1-800-767-2825 or electronically at <https://www.fincen.gov/contact>.

SUPPLEMENTARY INFORMATION: The CTA¹ establishes beneficial ownership information (BOI) reporting requirements for certain corporations, limited liability companies, and other entities created in or registered to do business in the United States. Collection and disclosure of BOI will facilitate important national security, intelligence, and law enforcement activities, and help prevent criminals, terrorists, proliferators, and other actors from abusing corporate structures to hide illicit proceeds in the United States. Specifically, the CTA authorizes FinCEN to collect and maintain BOI,² and requires the Secretary of the Treasury³ (Secretary) to establish by regulation protocols to protect the security and confidentiality of BOI.⁴ The CTA also authorizes FinCEN to disclose BOI to authorized governmental authorities and financial institutions, subject to effective safeguards and controls, and requires the Secretary to issue regulations regarding access to BOI by those authorized users.⁵ Finally, the CTA requires FinCEN to maintain BOI for a specified period of time.⁶

On September 30, 2022, FinCEN issued the final rule establishing BOI reporting requirements (the Reporting Rule),⁷ which will be effective on January 1, 2024. The Reporting Rule requires certain entities (reporting companies) to report to FinCEN information about themselves, as well as information about two categories of individuals: (1) the beneficial owners of the reporting company; and (2) the company applicants, who are the individuals who filed a document to create the reporting company or register it to do business in the United States. When submitting the required information to FinCEN, reporting companies must file a Beneficial Ownership Information Report (BOIR). They must also file an updated BOIR to reflect any changes to required information previously submitted to FinCEN. Additionally, for purposes of BOI reporting, an individual or a reporting company may obtain a FinCEN identifier (FinCEN ID). Generally, a FinCEN ID associated with an individual can be used in lieu of the information required to be reported about that individual, and the FinCEN ID associated with a reporting company can be used in lieu of certain information that would otherwise have to be reported about that company.

To collect and maintain BOI, FinCEN will utilize a secure, non-public database that employs methods and controls typically used by the Federal government to protect non-classified but sensitive information systems at the highest Federal Information Security Management Act (FISMA)⁸ level—FISMA High.⁹ The rating carries with it a requirement to implement certain baseline controls to protect the relevant information.¹⁰ In addition to information technology protection, FinCEN has operational, management, and physical controls for the handling and protection of records. Furthermore, access to BOI reported to FinCEN pursuant to the Reporting Rule will be governed by regulations specifically pertaining to BOI access and safeguards, including security and confidentiality.¹¹

These regulations aim to ensure that only authorized recipients have access to BOI and that access is used only for purposes permitted by the CTA.

Dated: August 25, 2023.

Ryan Law,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

SYSTEM NAME AND NUMBER:

Treasury/FinCEN .004 Beneficial Ownership Information System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Financial Crimes Enforcement Network (FinCEN), 1801 L Street NW, Washington, DC and Amazon Web Services, Headquarters Address: 410 Terry Ave. N, Seattle, WA 98109 (third-party vendor).

SYSTEM MANAGER:

Deputy Director, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183-0039.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The system is established and maintained in accordance with 31 U.S.C. 5336; 31 CFR Chapter X; and Treasury Order 180-01.

PURPOSE OF THE SYSTEM:

The purpose of this system is to collect, maintain, safeguard, and disclose BOI as permitted or required by the CTA and its implementing regulations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

There are three categories of individuals covered by this system: (1) individuals whose information is reported to FinCEN through BOIRs; (2) individuals who request FinCEN IDs; and (3) individuals who submit BOIRs to FinCEN.

The first category of individuals whose information will be included in the system are individuals reported either as “beneficial owners” or “company applicants” of reporting companies.¹² Subject to certain exemptions, a beneficial owner is any

Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 FR 77404 (Dec. 16, 2022), available at <https://www.federalregister.gov/documents/2022/12/16/2022-27031/beneficial-ownership-information-access-and-safeguards-and-use-of-fincen-identifiers-for-entities>.

¹² FinCEN, *Beneficial Ownership Information Reporting Requirements*, 87 FR 59498, 59593 (Sept. 30, 2022), available at <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.

¹ The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283 (Jan. 1, 2021). Division F of the NDAA is the AML Act, which includes the CTA.

² Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new section 5336, Beneficial Ownership Information Reporting Requirements, to subchapter II of chapter 53 of title 31, United States Code.

³ The authority of the Secretary to administer the BSA was delegated to the Director of FinCEN. Treasury Order 180-01 (Jan. 14, 2020).

⁴ 31 U.S.C. 5336(c)(8).

⁵ 31 U.S.C. 5336(c).

⁶ 31 U.S.C. 5336(c)(1).

⁷ FinCEN, *Beneficial Ownership Information Reporting Requirements*, 87 FR 59498 (Sept. 30, 2022), available at <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.

⁸ 44 U.S.C. 3541 *et seq.*

⁹ U.S. Department of Commerce, *Federal Information Processing Standards Publication: Standards for Security Categorization of Federal Information and Information Systems* (FIPS Pub 199) (Feb. 2004), available at <https://nvlpubs.nist.gov/nistpubs/fips/nist.fips.199.pdf>.

¹⁰ *Id.*

¹¹ FinCEN issued a notice of proposed rulemaking for the Access Rule. FinCEN, *Beneficial Ownership*

individual who, directly or indirectly, exercises substantial control over a reporting company or owns or controls at least 25 percent of the ownership interests of a reporting company. In the case of a domestic reporting company, a company applicant is the individual who directly files the document that forms the entity, or in the case of a foreign reporting company, who directly files the document that first registers the entity to do business in the United States. If more than one person is involved in the filing of the document, whether for a domestic or a foreign reporting company, the individual who is primarily responsible for directing or controlling the filing is also a company applicant.

The second category of individuals whose information will be included in the system are individuals who apply for a FinCEN ID. In order to obtain and retain a FinCEN ID, individuals will have to report certain information about themselves.

Finally, the third category of individuals whose information will be included in the system are individuals who submit the BOIR on behalf of the reporting company. Some identifiable information about those individuals will be included in the system by virtue of their interactions with the IT system.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of (1) information submitted to FinCEN in BOIRs and FinCEN ID requests; (2) information submitted to FinCEN by and about individuals that submit BOIRs on behalf of a reporting company; and (3) information that FinCEN obtains from federal government agencies and commercial vendors for purposes of data quality assurance and enhancement, such as standardizing addresses and other information submitted in BOIRs and FinCEN ID requests.

Records include, but may not be limited to, the following information, which is being collected either pursuant to the CTA or as needed to administer the BOI System.

- full legal names,
- dates of birth,
- residential and business addresses,
- unique identifying numbers from one of the following:
 - State-issued driver's license,
 - U.S. or foreign passport,
 - State/local/Tribal-issued identification,
 - images of identification documents containing these numbers,
 - FinCEN ID numbers, and
 - email addresses, as needed to administer the BOI System.

RECORD SOURCE CATEGORIES:

Records in the BOI system may be provided by individuals and entities. In addition to information provided in a BOIR about a reporting company's beneficial owners or company applicants, individuals submitting BOIRs on behalf of reporting companies will provide limited information about themselves. Individuals applying for FinCEN IDs will provide information about themselves. Commercial vendors and federal government agencies will provide data quality assurance and enhancement information that covers the same categories of information as that provided by individuals and reporting companies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Records in this system may be used to:

(1) Disclose information to the United States Department of Justice (DOJ) for the purpose of providing representation or legal advice in anticipation of, or in connection with, a proceeding before a court, adjudicative body, or other administrative body, when such proceeding involves: (a) Treasury or any bureau or office thereof; (b) any employee of Treasury in their official capacity; (c) any employee of Treasury in their individual capacity where DOJ or Treasury has agreed to represent the employee; or (d) the United States, if the use of such information by DOJ is deemed by DOJ or Treasury to be relevant and necessary and provided that the disclosure is compatible with the purpose for which information was collected;

(2) Disclose information in furtherance of national security, intelligence, or law enforcement activity by Federal agencies engaged in such activities, consistent with 31 U.S.C. 5336(c)(2)(B)(i)(I);

(3) Disclose information for use in criminal or civil investigations by State, local, and Tribal law enforcement agencies, consistent with 31 U.S.C. 5336(c)(2)(B)(i)(II);

(4) Disclose information to Federal agencies that have submitted requests on behalf of foreign law enforcement agencies, prosecutors, and judges, including foreign central authorities or competent authorities, consistent with 31 U.S.C. 5336(c)(2)(B)(ii);

(5) Disclose information to financial institutions, consistent with 31 U.S.C. 5336(c)(2)(B)(iii) and (C);

(6) Disclose information to Federal functional regulators and other appropriate regulatory agencies,

consistent with 31 U.S.C. 5336(c)(2)(B)(iv) and (C);

(7) Disclose information to Treasury officers, employees, contractors, or agents for their official duties, including tax administration purposes, consistent with 31 U.S.C. 5336(c)(5);

(8) Disclose to appropriate agencies, entities, and persons when (1) FinCEN suspects or has confirmed that there has been a breach of the system of records, (2) FinCEN has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, FinCEN (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with FinCEN efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(9) Disclose information to another Federal agency or Federal entity, when FinCEN determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach;

(10) Disclose information to student volunteers and other individuals not having the status of agency employees, if they need access to the information to perform services as authorized under law relating to the official programs and operations of FinCEN. Individuals provided records under this routine use are subject to the same requirements and limitations on disclosure as are applicable to FinCEN officers and employees; and

(11) To the extent permitted and required by law, disclose information to the National Archives and Records Administration Archivist (or the Archivist's designee) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

FinCEN maintains records in this system in security controlled physical locations, using information technology that follows federal information security standards and directives.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records collected in the system are accessible, for authorized purposes, to various categories of recipients described above in the "Routine Uses of Records" section. Users will be able to retrieve these records by name or other unique identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

FinCEN maintains records in this system in a secure IT system following federal information security standards and directives and in security controlled physical locations. FinCEN ID application records will be retained for at least five (5) years after every reporting company to which the FinCEN ID is applied terminates. Pursuant to the CTA, BOIR records will be retained for at least five (5) years after the reporting company terminates.¹³ Records will be disposed of in accordance with the requirements of the CTA, the Federal Records Act,¹⁴ and applicable record retention schedules.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FinCEN safeguards BOI records in this system in accordance with applicable rules and policies, including all applicable Treasury information systems security and access policies. FinCEN imposes strict controls to minimize the risk of compromising the information that is being stored. Access to the records in this system is limited to those individuals who have appropriate permissions. User activity is recorded by the system for audit purposes. Electronic records are encrypted at rest and in transit. Records are maintained in buildings subject to 24-hour security.

RECORD ACCESS PROCEDURES:

This system is exempt from notification requirements, record access requirements, and requirements that an individual be permitted to contest its contents, pursuant to the provisions of 5 U.S.C. 552a(j)(2) and (k)(2).

CONTESTING RECORD PROCEDURES:

This system is exempt from notification requirements, record access requirements, and requirements that an individual be permitted to contest its contents, pursuant to the provisions of 5 U.S.C. 552a(j)(2) and (k)(2).

NOTIFICATION PROCEDURES:

This system is exempt from notification requirements, record access

requirements, and requirements that an individual be permitted to contest its contents, pursuant to the provisions of 5 U.S.C. 552a(j)(2), and (k)(2).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system is exempt from 5 U.S.C. 552a(c)(3), (c)(4), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(2), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2), and (k)(2). See 31 CFR 1.36.

HISTORY:

None.

[FR Doc. 2023-19814 Filed 9-12-23; 8:45 am]

BILLING CODE 4810-02-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Thursday, October 12, 2023.

FOR FURTHER INFORMATION CONTACT: Kelvin Johnson at 1-888-912-1227 or (504) 202-9679.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that an open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be held Thursday, October 12, 2023, at 3:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Ann Tabat. For more information, please contact Kelvin Johnson at 1-888-912-1227 or (504) 202-9679, or write TAP Office, 1555 Poydras Street, 2nd Floor, MS 12, New Orleans, LA 70112 or contact us at the website: <http://www.improveirs.org>. The agenda will include a committee discussion about the IRS response to Issue 53484-LTR 3030C (Bal-Due/Interest Due). There

will be a discussion of the Difficult/Challenging Letters/Notices, and a Review of Notice CP503.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19750 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel Joint Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Joint Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference through the Microsoft Teams Platform.

DATES: The meeting will be held Monday, October 23, 2023.

FOR FURTHER INFORMATION CONTACT: Conchata Holloway at 1-888-912-1227 or 214-413-6550.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Monday, October 23, 2023, at 3:00 p.m. Eastern Time via teleconference. The public is invited to make oral comments or submit written statements for consideration. For more information, please contact Conchata Holloway at 1-888-912-1227 or 214-413-6550, or write TAP Office, 1114 Commerce St., MC 1005, Dallas, TX 75242 or contact us at the website: <http://www.improveirs.org>.

The agenda will include the potential project referrals from the committees, and discussions on priorities the TAP will focus on for the 2023 year. Public input is welcomed.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19751 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

¹³ 31 U.S.C. 5336(c)(1).

¹⁴ See 44 U.S.C. Ch. 31.

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Improvements Project Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, October 10, 2023.

FOR FURTHER INFORMATION CONTACT: Matthew O'Sullivan at 1-888-912-1227 or (510) 907-5274.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that an open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements (TAC) Project Committee will be held Tuesday, October 10, 2023, at 2:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Matthew O'Sullivan. For more information please contact Matthew O'Sullivan at 1-888-912-1227 or (510) 907-5274, or write TAP Office, 1301 Clay Street, Oakland, CA 94612-5217 or contact us at the website: <http://www.improveirs.org>. The agenda includes a committee discussion involving Taxpayer Communications—Recordkeeping, Access to the TAC for disabled taxpayers, and Parameters for the VITA Program.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19746 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, October 10, 2023.

FOR FURTHER INFORMATION CONTACT: Ann Tabat at 1-888-912-1227 or (602) 636-9143.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that a meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be held Tuesday, October 10, 2023, at 11:00 a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Ann Tabat. For more information, please contact Ann Tabat at 1-888-912-1227 or (602) 636-9143, or write TAP Office, 4041 N Central Ave., Phoenix, AZ 85012 or contact us at the website: <http://www.improveirs.org>. The agenda will include a committee discussion involving 57139 Digital Assets/Cryptocurrency; and 64919 Decedent and Trust forms and publications.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19745 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer

Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Thursday, October 12, 2023.

FOR FURTHER INFORMATION CONTACT: Conchata Holloway at 1-888-912-1227 or 214-413-6550.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that a meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee will be held Thursday, October 12, 2023, at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Conchata Holloway. For more information, please contact Conchata Holloway at 1-888-912-1227 or 214-413-6550, or write TAP Office, 1114 Commerce St., MC 1005, Dallas, TX 75242 or contact us at the website: <http://www.improveirs.org>. The agenda includes a committee discussion involving Increase E-filing of Forms/Tax Returns, Entities with multiple EINs, and Effectively measuring outreach.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19749 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Thursday, October 12, 2023.

FOR FURTHER INFORMATION CONTACT:

Rosalind Matherne at 1-888-912-1227 or 202-317-4115.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that an open meeting of the Taxpayer Advocacy Panel Toll-Free Phone Lines Project Committee will be held Thursday, October 12, 2023, at 2:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Rosalind Matherne. For more information, please contact Rosalind Matherne at 1-888-912-1227 or 202-317-4115, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: <http://www.improveirs.org>. The agenda includes a committee discussion that may involve On-line Chat feature, On-hold Music, Identity Theft Prevention and Victim Assistance Measures, Dashboard Data for Where's My Refund, and The Right to Quality Service on the Phone Line.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19748 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Open Meeting of the Taxpayer Advocacy Panel's Special Projects Committee**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Wednesday, October 11, 2023.

FOR FURTHER INFORMATION CONTACT: Antoinette Ross at 1-888-912-1227 or 202-317-4110.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app. (1988) that an open meeting of the Taxpayer

Advocacy Panel's Special Projects Committee will be held Wednesday, October 11, 2023, at 11:00 a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Antoinette Ross. For more information please contact Antoinette Ross at 1-888-912-1227 or 202-317-4110, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: <http://www.improveirs.org>. The agenda includes a committee discussion involving Expand VITA Programs that Service International Taxpayers; Video Conference Calls for US Taxpayers; IP Pin Letter for Overseas Taxpayers; Estate Gift Tax; Provide Clarity on Free File Pricing Under *IRS.gov*; Form 706 Estate Gift Tax Forms and Instructions; and Tax Practitioners Revealing Their PII.

Dated: September 6, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023-19747 Filed 9-12-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0546]

Agency Information Collection Activity Under OMB Review: Gravesite Reservation Questionnaire

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the National Cemetery Administration (NCA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link www.reginfo.gov/public/do/PRAMain, select "Currently under Review—Open for Public Comments", then search the list for the information collection by Title or "OMB Control No. 2900-0546."

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266-4688 or email maribel.aponte@va.gov. Please refer to "OMB Control No. 2900-0546" in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 2402.

Title: Gravesite Reservation

Questionnaire.

OMB Control Number: 2900-0546.

Type of Review: Extension of a currently approved collection.

Abstract: The information is needed to determine if individuals holding gravesite set-asides wish to retain their set-aside or their wish to relinquish it. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published at 88 FR 43419, July 7, 2023.

Affected Public: Individuals or households.

Estimated Annual Burden: 4,167 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 25,000.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023-19696 Filed 9-12-23; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS**Special Medical Advisory Group, Notice of Meeting**

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. chapter 10, that the Special Medical Advisory Group (the Committee) will meet on Wednesday, September 13, 2023, from 9:00 a.m. to 3:30 p.m. Eastern Standard Time (EST), at the James A. Haley Veterans Hospital, 13000 Bruce B. Downs Blvd., Tampa, FL 33612. Members of the Committee may join in person or virtually. The public

will only be able to attend virtually. Public stakeholder seating is very limited and must be coordinated in advance with the DFO. The TAMPA Medical Center Conference Room #101 will not accommodate more than the committee members, agency senior leaders, Designated Federal Official, and a few public in person attendees.

The purpose of the Committee is to advise the Secretary of Veterans Affairs and the Under Secretary for Health on the care and treatment of Veterans, and other matters pertinent to the Veterans Health Administration.

On September 13, 2023, the agenda for the meeting may include discussions on Women's Health Challenges, Virtual Care/Telehealth, Mental Health Initiative, COVID-19 Lessons Learned and Planning for the Next Pandemic, Manchester VA Task Force 2025, Electronic Health Record Modernization (EHRM) updates, Population Health Initiatives for Veterans, and Update on new VA Facilities. The meeting is open to the public, except when the Committee discusses and reviews sensitive/confidential presentation materials related to Electronic Health Record Modernization (EHRM) updates between approximately 9:30 a.m. and 10:30 a.m. ET, and when the Committee

breaks for lunch from approximately 11:30 a.m. and 12:10 p.m. ET. The sensitive/confidential EHRM updates discussion will be closed in accordance with 5 U.S.C. 552(c)(2)(4). An announcement at the start of the meeting will be made to all in person and virtual attendees making them aware of any adjustments to topic session times.

The meeting can be joined by phone at 404-397-1596 (Access code: 27615067655) and via Webex at: <https://veteransaffairs.webex.com/wbxmjs/joinservice/sites/veteransaffairs/meeting/download/9d62dda14414969bb1f3ed8c27aa539?siteurl=veteransaffairs&MTID=m60405b2049a8092a5b2c7713896b1123>. Please contact the point of contact below for assistance connecting.

Members of the public may submit written statements for review by the Committee to: Department of Veterans Affairs, Special Medical Advisory Group—Office of Under Secretary for Health (10), Veterans Health Administration, 810 Vermont Ave. NW, Washington, DC 20420 or by email at VASMAGDFO@va.gov. Comments will be accepted until close of business on Friday, September 8, 2023.

Any member of the public wishing to attend the virtual meeting or seeking additional information should email VASMAGDFO@va.gov or call 206-310-5607.

Dated: September 8, 2023.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2023-19759 Filed 9-12-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting, Amended

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. chapter 10, that the Advisory Committee on Disability Compensation (hereinafter the Committee) will hold meeting sessions on Tuesday, September 19, 2023, through Thursday, September 21, 2023, at various locations in Reno, Nevada, and shown below. The meeting sessions will begin and end as follows:

Public participation will commence as follows:

Date	Time	Location	Open session
September 19, 2023	9:00 a.m.–3:30 p.m. Pacific Standard Time (PST).	Reno Regional Office, 5460 Reno Corporate Drive, Reno, NV 89511.	No.
September 20, 2023	9:00 a.m.–4:30 p.m. PST	Reno Regional Office, 5460 Reno Corporate Drive, Reno, NV 89511.	Yes.
September 21, 2023	9:00 a.m.–12:00 p.m. PST	Reno VA Medical Center, 975 Kirman Avenue, Reno, NV 89502.	No.
September 21, 2023	1:00 p.m.–4:30 p.m. PST	Reno Vet Center, 5580 Mill Street, Reno, NV 89502	No.

Sessions are open to the public, except when the Committee is conducting tours of VA facilities. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C. 552b(c)(6).

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities (VASRD). The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

On Tuesday, September 19, 2023, the Committee will convene a closed

session from 9:00 a.m. to 3:30 p.m. PST, as it tours the Reno Regional Office. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C. 552b(c)(6).

On Wednesday, September 20, 2023, the Committee will convene an open session from 9:00 a.m. to 4:30 p.m. PST to hold a Veteran Townhall, receive a briefing from a VA Senior Leader (or designee), and meet with Veteran Service Officers and Congressional/Senatorial staffers.

On Thursday, September 21, 2023, the Committee will convene a closed session from 9:00 a.m. to 4:30 p.m. PST, as it tours the Reno VA Medical Center and the Reno Vet Center. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C. 552b(c)(6).

The public is invited to address the Committee during the public comment

period, which will be open for 30-minutes from 3:30 p.m. to 4:00 p.m. PST on Wednesday, September 20, 2023. The public can also submit one-page summaries of their written statements for the Committee's review. Public comments must be received no later than September 13, 2023, for inclusion in the official meeting record. Please send these comments to Jadine Piper of the Veterans Benefits Administration, Compensation Service, at 21C.ACDC.VBACO@va.gov.

Additionally, any member of the public or media planning to attend or seeking additional information, or those who wish to obtain a copy of the agenda should contact Jadine Piper at 21C.ACDC.VBACO@va.gov, and provide their name, professional affiliation, email address and phone number. The call-in number (United States, Chicago) for those who would like to attend the meeting is: 872-701-0185; phone

conference ID: 814 961 665#. Members of the public may also access the meeting by pasting the following URL into a web browser: https://bit.ly/ACDC_Public_SeptMeeting.

Dated: September 8, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–19740 Filed 9–12–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0559]

Agency Information Collection

Activity: (Grant Funded Cemetery Data Sheet and Cemetery Grant Documents)

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The National Cemetery Administration (NCA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each revised

collection allow 30 days for public comment in response to the notice. This notice solicits comments on information of the VA Forms required of a State or Tribal Organization seeking a grant for the establishment, expansion, or improvement of a State of Tribal veterans cemetery for preapplication.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by clicking on the following link www.reginfo.gov/public/do/PRAMain, select “Currently under Review—Open for Public Comments”, then search the list for the information collection by title or “OMB Control No. 2900–0559.”

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0559” in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 25 U.S.C. 450b(1); 38 U.S.C. 501; 38 U.S.C. 2408; 38 U.S.C. 2411; 38 CFR 39.31.

Title: Grant Funded Cemetery Data, VA Form 40–0241 and Cemetery Grant Documents, 40–0895 Series.

OMB Control Number: 2900–0559.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 40–0241 and Cemetery Grant Documents, 40–0895 Series, are required to provide data regarding the number of interments conducted at VA Grant Funded Veterans cemeteries and support grant preapplication each year. This data is necessary for budget, oversight and compliance purposes associated with exiting and establishment of new State and Tribal government Veteran cemeteries.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published at 88 FR 43423, July 7, 2023.

Affected Public: State, local and Tribal governments.

Estimated Annual Burden: 296 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 292.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–19695 Filed 9–12–23; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

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No. 176

September 13, 2023

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Ocean Wind 1 Project Offshore of New Jersey; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 230901–0209]

RIN 0648–BL36

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Ocean Wind 1 Project Offshore of New Jersey

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS promulgates regulations to govern the incidental taking of marine mammals incidental to Ocean Wind, LLC (Ocean Wind), a subsidiary wholly owned by Orsted Wind Power North America, LLC (Orsted), construction of the Ocean Wind 1 Offshore Wind Energy Project (hereafter known as the “Project”) in Federal and State waters off of New Jersey, specifically within the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Area OCS–A 0498 (Lease Area) and along two export cable routes to sea-to-shore transition points (collectively referred to as the “Project Area”), over the course of 5 years (October 13, 2023 through October 12, 2028). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during construction-related activities within the Project Area during the effective dates of the regulations, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: This rulemaking and issued LOA are effective from October 13, 2023 through October 12, 2028.

FOR FURTHER INFORMATION CONTACT: Kelsey Potlock, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:**Availability**

A copy of Ocean Wind’s Incidental Take Authorization (ITA) application,

supporting documents, received public comments, and the proposed rulemaking, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>. In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

This final rule, as promulgated, provides a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) for NMFS to authorize the take of marine mammals incidental to construction of the Project within the Project Area. NMFS received a request from Ocean Wind to incidentally take individuals of 17 species of marine mammals, comprising 18 stocks (10 stocks by Level A harassment and Level B harassment and 8 stocks by Level B harassment only), incidental to Ocean Wind’s 5 years of construction activities. No mortality or serious injury was requested nor is it anticipated or authorized in this final rulemaking.

Legal Authority for the Final Action

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are promulgated (when applicable), and public notice and an opportunity for public comment are provided.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). If such findings are made, NMFS must prescribe the permissible methods of taking; “other means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as “mitigation”); and requirements

pertaining to the monitoring and reporting of such takings.

As noted above, no serious injury or mortality is anticipated or authorized in this final rule. Relevant definitions of MMPA statutory and regulatory terms are included below:

- *U.S. Citizens*—individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13) (50 CFR 216.103);
- *Take*—to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13); 50 CFR 216.3);
- *Incidental harassment, incidental taking, and incidental, but not intentional, taking*—an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental (see 50 CFR 216.103);
- *Serious Injury*—any injury that will likely result in mortality (50 CFR 216.3);
- *Level A harassment*—any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362(18); 50 CFR 216.3); and
- *Level B harassment*—any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (16 U.S.C. 1362(18); 50 CFR 216.3).

Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for proposing and, if appropriate, issuing regulations and an associated LOA(s). This final rule establishes permissible methods of taking and mitigation, monitoring, and reporting requirements for Ocean Wind’s construction activities.

Summary of Major Provisions Within the Final Rule

The major provisions of this final rule are:

- The authorized take of marine mammals by Level A harassment and/or Level B harassment;
- No authorized take of marine mammals by mortality or serious injury;
- The establishment of a seasonal moratorium on impact pile driving of foundation piles during the months of the highest presence of North Atlantic right whales (*Eubalaena glacialis*) in the Lease Area (December 1–April 30,

annually), unless prior approval from NMFS for pile driving in December;

- The establishment of a seasonal moratorium on unexploded ordnance or munitions and explosives of concern (UXOs/MECs) detonations from November 1–April 30, annually;

- A requirement for UXO/MEC detonations to only occur during hours of daylight and not during hours of darkness;

- A requirement for both visual and passive acoustic monitoring to occur by trained, NOAA Fisheries-approved Protected Species Observers (PSOs) and Passive Acoustic Monitoring (PAM; where required) operators before, during, and after select activities;

- A requirement for training for all Ocean Wind personnel to ensure marine mammal protocols and procedures are understood;

- The establishment of clearance and shutdown zones for all in-water construction activities to prevent or reduce the risk of Level A harassment and to minimize the risk of Level B harassment;

- A requirement to use sound attenuation device(s) during all foundation impact pile driving installation activities and UXO/MEC detonations to reduce noise levels to those modeled assuming 10 decibels (dB);

- A delay to the start of foundation installation and UXO/MEC detonations if a North Atlantic right whale is observed at any distance by PSOs or acoustically detected within certain distances;

- A delay to the start of foundation installation and UXO/MEC detonations if other marine mammals are observed entering or within their respective clearance zones;

- A requirement to shut down impact pile driving (if feasible) if a North Atlantic right whale is observed or if any other marine mammals are observed entering their respective shut down zones;

- A requirement to implement sound field verification during impact pile driving of foundation piles and during UXO/MEC detonations to measure *in-situ* noise levels for comparison against the modeled results;

- A requirement to implement soft-starts during impact pile driving using the least amount of hammer energy necessary for installation;

- A requirement to implement ramp-up during the use of high-resolution geophysical (HRG) marine site characterization survey equipment;

- A requirement for PSOs to continue to monitor for 30 minutes after any impact pile driving for foundation

installation and after any UXO/MEC detonations;

- A requirement for the increased awareness of North Atlantic right whale presence through monitoring of the appropriate networks and Channel 16, as well as reporting any sightings to the sighting network;

- A requirement to implement various vessel strike avoidance measures;

- A requirement to implement measures during fisheries monitoring surveys, such as removing gear from the water if marine mammals are considered at-risk or are interacting with gear; and

- A requirement for frequently scheduled and situational reporting including, but not limited to, information regarding activities occurring, marine mammal observations and acoustic detections, and sound field verification monitoring results.

NMFS must withdraw or suspend an LOA issued under these regulations, after notice and opportunity for public comment, if it finds the methods of taking or the mitigation, monitoring, or reporting measures are not being substantially complied with (16 U.S.C. 1371(a)(5)(B); 50 CFR 216.206(e)). Additionally, failure to comply with the requirements of the LOA may result in civil monetary penalties and knowing violations may result in criminal penalties (16 U.S.C. 1375).

Fixing America's Surface Transportation Act (FAST-41)

This project is covered under Title 41 of the Fixing America's Surface Transportation Act or "FAST-41." FAST-41 includes a suite of provisions designed to expedite the environmental review for covered infrastructure projects, including enhanced interagency coordination as well as milestone tracking on the public-facing Permitting Dashboard. FAST-41 also places a 2-year limitations period on any judicial claim that challenges the validity of a Federal agency decision to issue or deny an authorization for a FAST-41 covered project (42 U.S.C. 4370m-6(a)(1)(A)).

Ocean Wind's project is listed on the Permitting Dashboard, where milestones and schedules related to the environmental review and permitting for the project can be found at <https://www.permits.performance.gov/permitting-projects/ocean-wind-project>.

Summary of Request

On October 21, 2021, Ocean Wind submitted a request for the promulgation of regulations and issuance of an associated LOA to take

marine mammals incidental to construction activities associated with the Project in the Project Area. The request was for the incidental, but not intentional, taking of a small number of 17 marine mammal species (comprising 18 stocks) by Level B harassment (all 18 stocks) and by Level A harassment (10 species or stocks). Ocean Wind did not request and NMFS neither expects nor authorizes incidental take by serious injury or mortality.

In response to our questions and comments and following extensive information exchange between Ocean Wind and NMFS, Ocean Wind submitted a final revised application on February 8, 2022. NMFS deemed it adequate and complete on February 11, 2022. This final application is available on NMFS' website at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

On March 7, 2022, NMFS published a notice of receipt (NOR) of Ocean Wind's adequate and complete application in the **Federal Register** (87 FR 12666), requesting public comments and information on Ocean Wind's request during a 30-day public comment period. During the NOR public comment period, NMFS received comment letters from two environmental non-governmental organizations (ENGOS): Clean Ocean Action (COA) and the Natural Resource Defense Council (NRDC) on behalf of several other ENGOS.

On October 26, 2022, NMFS published a proposed rule in the **Federal Register** for the Ocean Wind 1 Project (87 FR 64868). In the proposed rule, NMFS synthesized all of the information provided by Ocean Wind, all best available scientific information and literature relevant to the proposed project, outlined, in detail, proposed mitigation designed to effect the least practicable adverse impacts on marine mammal species and stocks as well as proposed monitoring and reporting measures, and made preliminary negligible impact and small numbers determinations. The public comment period on the proposed rule was open for 45 days on [Regulations.gov](https://www.regulations.gov) starting on October 26, 2022 and closed after December 10, 2022. Specific details on the public comments received during this 45-day period are described in the Comments and Responses section.

NMFS has previously issued three Incidental Harassment Authorizations (IHAs) to Ocean Wind for related work regarding high resolution site characterization surveys (82 FR 31562, July 7, 2017; 86 FR 26465, May 14, 2021; 87 FR 29289, May 13, 2022). To

date, Ocean Wind has complied with all the requirements (e.g., mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Estimated Take section. These monitoring reports can be found on NMFS' website: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations (87 FR 46921, August 1, 2022) to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event (UME). Should a final vessel speed rule be issued and become effective during the effective period of these regulations (or any other MMPA incidental take authorization), the authorization holder will be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders will be required to comply with the requirements of the vessel speed rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization will remain in place. The responsibility to comply with the applicable requirements of any vessel speed rule will become effective immediately upon the effective date of any final vessel speed rule, and when notice is published on the effective date, NMFS will also notify Ocean Wind if the measures in the speed rule were to supersede any of the measures in the MMPA authorization such that they were no longer required.

Description of the Specified Activities

Overview

Ocean Wind plans to construct and operate the Project, a 1,100-megawatt (MW) offshore wind farm, in the Project Area. The Project will allow the State of New Jersey to meet its renewable energy goals under the New Jersey Offshore Wind Economic Development Act. The Project will consist of several different types of permanent offshore infrastructure, including wind turbine generators (WTGs; e.g., the GE Haliade-X 12 MW) and associated foundations, offshore substations (OSS), offshore substation array cables, offshore export cables, and substation interconnector cables. Overall, Ocean Wind will conduct the following specified activities: install 98 WTGs and 3 OSS on monopile foundations via impact pile driving; install and subsequently remove cofferdams and goal posts to assist in the installation of the export cable route by vibratory pile driving; several types of fishery and ecological monitoring surveys; placement of scour protection; trenching, laying, and burial activities associated with the installation of the export cable route from OSSs to shore-based converter stations and inter-array cables between turbines; HRG vessel-based site characterization surveys using active acoustic sources with frequencies of less than 180 kilohertz (kHz); the detonation of up to ten UXOs/MECs of different charge weights, as necessary; transit within the Project Area and between ports and the Lease Area to transport crew, supplies, and materials to support pile installation via vessels; and WTG operation. All offshore cables will connect to onshore export cables, substations, and grid connections, which will be located in Ocean County, New Jersey and Cape May County, New Jersey. Marine mammals exposed to elevated noise levels during impact and vibratory pile driving, detonations of UXOs/MECs, and/or site characterization surveys may be taken by Level A harassment and/or Level B harassment, depending on the specified activity.

A detailed description of the Project is provided in the proposed rule as published in the **Federal Register** (87 FR 64868, October 26, 2022). Since the proposed rule was published, Ocean Wind has modified the project start and end dates, changing them from August 2023 to July 2028 to a new effective period of October 13, 2023 to October 12, 2028. Ocean Wind has also modified its vibratory pile driving activity from vibratory pile driving of seven temporary cofferdams to vibratory pile driving of four temporary cofferdams (Barnegat Bay landfall locations) and three temporary goal posts (two at Island Beach State Park, one at BL England). This modification neither changes the nature of the specified activity (i.e., vibratory pile driving), not the potential impacts to marine mammals associated with the specified activity. As described in the Estimated Take section below, this modification reduces the number of takes anticipated from vibratory pile driving. Ocean Wind has not modified any other activity from what was previously described in the proposed rule. We hereby incorporate the updated Project description, as provided by Ocean Wind, by reference; therefore, a more detailed description is not provided here. Please refer to the proposed rule and Ocean Wind's supporting information (e.g., application, memos) for more information on the description of the specified activities.

Dates and Duration

Ocean Wind anticipates its specified activities to occur throughout all 5 years of the final rule, beginning on October 13, 2023 and continuing through October 12, 2028. Ocean Wind anticipates the following construction schedule over the 5-year period (Table 1). Ocean Wind has noted that these are the best and conservative estimates for activity durations but that the schedule may shift due to weather, mechanical, or other related delays. Additional information on dates and activity-specific durations can be found in the proposed rule and are not repeated here.

TABLE 1—CONSTRUCTION SCHEDULE

Activity	Estimated schedule ^a
HRG Surveys	Q3 2023–Q2 2028.
UXO/MEC Detonation	Q4 2023–Q3 2028.
Landfall Cable Installation	Q4 2023–Q4 2024.
Offshore Export Cable Installation	Q2 2024–Q1 2025.
Offshore Foundation Installation (WTG and OSS)	Q2 2024–Q4 2024.
Inter-array Cable Installation	Q3 2024–Q2 2025.
WTG and OSS Installation and Commissioning	Q3 2024–Q1 2026.

TABLE 1—CONSTRUCTION SCHEDULE—Continued

Activity	Estimated schedule ^a
Fishery Monitoring Surveys	Q2 2022–Q4 2027.

Note: “Q1, Q2, Q3, and Q4” each refer to a quarter of the year, starting in January and comprising 3 months each. Therefore, Q1 represents January through March, Q2 represents April through June, Q3 represents July through September, and Q4 represents October through December.

^aWe acknowledge that the schedule may need to shift, given unforeseeable circumstances (*e.g.*, inclement weather, mechanical difficulties) but the dates and durations presented here represent the most realistic schedule.

Specific Geographic Region

A detailed description of the Specific Geographic Region is provided in the proposed rule as published in the **Federal Register** (87 FR 64868, October 26, 2022). Since the proposed rule was published, no changes have been made to the Specified Geographic Region. Generally, Ocean Wind’s specified

activities (*i.e.*, impact pile driving of WTGs and OSS monopile foundations; vibratory pile driving (installation and removal) of temporary cofferdams and goal posts; placement of scour protection; trenching, laying, and burial activities associated with the installation of the export cable route and inter-array cables; HRG site

characterization surveys; UXOs/MECs detonation; and WTG operation) are concentrated in the Project Area. A couple of Ocean Wind’s specified activities (*i.e.*, fishery and ecological monitoring surveys and transport vessels) will occur in the Mid-Atlantic Bight.

BILLING CODE 3510–22–P

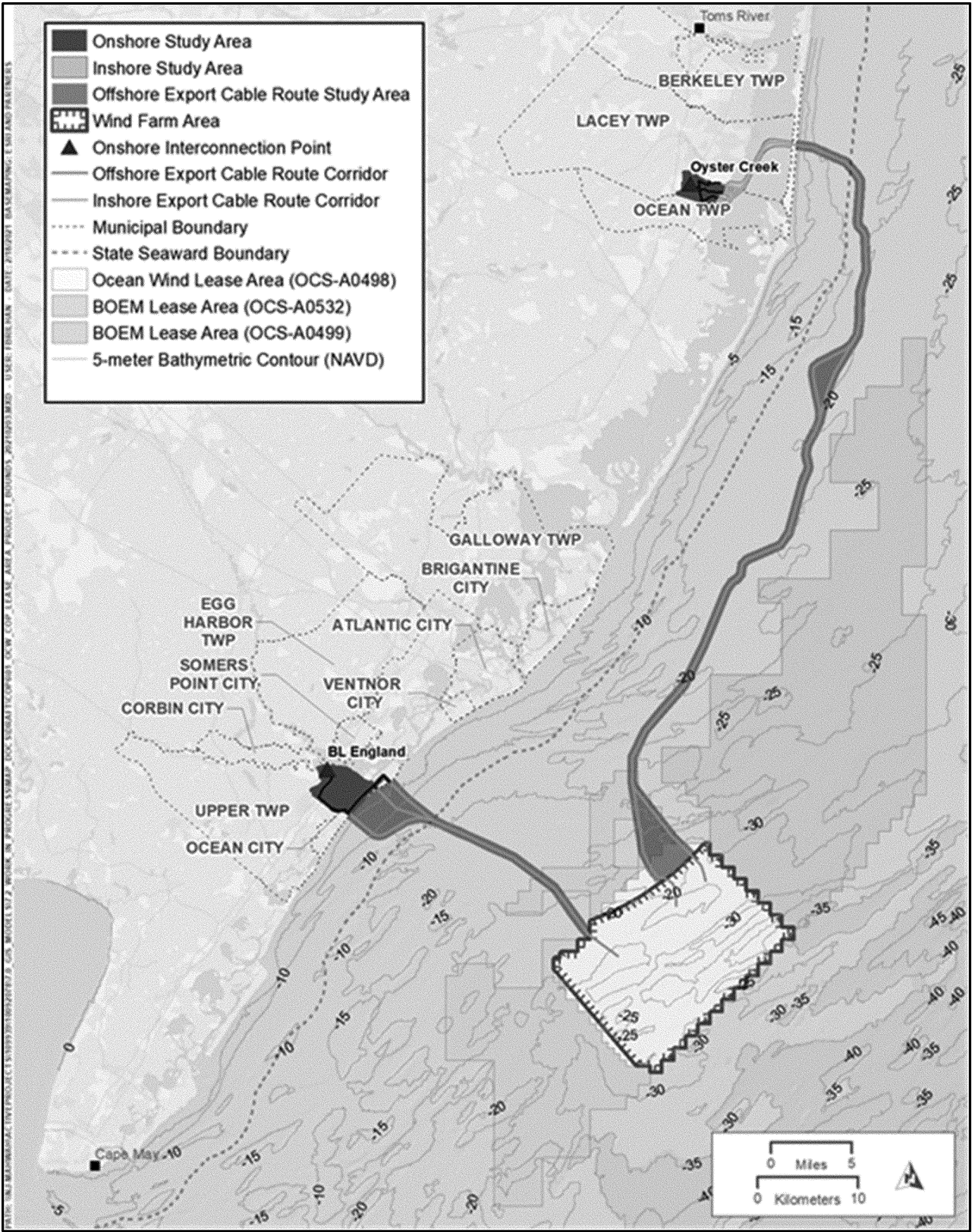


Figure 1 – Project Area

BILLING CODE 3510-22-C

Comments and Responses

A notice of proposed rulemaking was published in the **Federal Register** on

October 26, 2022 (87 FR 64868) and a 15-day extension to the public comment period was published on November 25, 2022 (87 FR 72447). The proposed

rulemaking described, in detail, Ocean Wind's specified activities, the specific geographic region of the specified activities, the marine mammal species that may be affected by those activities, and the anticipated effects on marine mammals. In the proposed rule, we requested that interested persons submit relevant information, suggestions, and comments on Ocean Wind's request for the promulgation of regulations and issuance of an associated LOA described therein, our estimated take analyses, the preliminary determinations, and the proposed regulations. In total, the proposed rule was available for a 45-day public comment period.

In total, NMFS received 20 comment submissions, including 14 comments from private individuals. Some of these comments were out-of-scope or not applicable to this specific action (e.g., general support/opposition to the Project itself; concerns for other species outside of NMFS' jurisdiction (*i.e.*, birds); maintenance of the permanent structures; Internal Revenue Service tax filing information), and are not described herein or discussed further. Four comment letters were from ENGOs, including one from COA, one from Oceana, Inc. (Oceana), and two from the NRDC, of which one was a comment letter with an attachment and the other was a request to extend the comment period an additional 15 days (hence, the extension published in the **Federal Register** on November 25, 2022 (87 FR 72447)). We also received one comment letter from a governmental organization, the Marine Mammal Commission (Commission), and one comment letter from a public organization, the Conservation Law Foundation (CLF). These five letters (excluding the NRDC request for a 15-day comment period extension on the proposed regulations) contained substantive information that NMFS considered in its estimated take analysis, final determinations, and final regulations. These comments are described below, along with NMFS' responses. All substantive comments and letters are available on NMFS' website: <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. Please review the corresponding public comment link for full details regarding the comments and letters.

Modeling and Take Estimates

Comment 1: The Commission recommended that, until JASCO Applied Sciences' (hereafter, "JASCO") model has been validated with *in-situ* measurements from the impact installation of monopiles and pin piles in the northwest Atlantic, NMFS should

require Ocean Wind and thus JASCO to re-estimate the various Level A harassment and Level B harassment zones for the final rule using source levels that are at a minimum 3 dB greater than those currently used.

Response: The Commission has expressed concerns about the lack of validation of JASCO's models in previous Commission letters for Orsted's other wind projects. JASCO has compared their source model predictions to an empirical model prediction by the Institute of Technical and Applied Physics (ITAP). The empirical model is based on a large data set of pile driving sounds measured at 750 m from the source collected during installation of large-diameter piles (up to 8 m) during wind farm installation in the North Sea (Bellmann, 2020). As no noise measurements exist for tapered 8/11-m monopile at this time (yet to be installed offshore), the ITAP prediction facilitates a way of validating the source levels of the numerical finite difference (FD) model. The ITAP data are averaged across different scenarios; pile sizes are grouped, which includes different hammers, water depths, depths of penetration, and environmental conditions; and the 95th percentile level is reported, whereas the aim of JASCO's modeling is to estimate the median value. While the ITAP forecast and the FD source predictions were comparable (see Appendix I of the Ocean Wind 1 Underwater Acoustic and Exposure Modeling report (Küsel *et al.*, 2022)), there is variance in the underlying ITAP data and there are parametric choices for the FD model in the different environments, so an exact match is not expected. As part of the comparison, it was found that different (but reasonable) parametric input choices in the FD modeling can result in output differences on the order of the variance in the ITAP data so it was concluded that the FD modeling approach performed as well as can be discernible given the available data. While adding 3 dB to the JASCO predictions at 750 m may bring JASCO's source predictions into line with the finite-element (FE) predictions for the portmanteau combining computation, comparison, and pile (COMPILE) scenario but it is not clear that this would be more accurate. This approach assumes that the FE models are correct but Lippert *et al.* (2016) also state "a drawback of (the FE) approach is that it simulates the energy loss due to friction in an indirect and rather nonphysical way." The Commission also suggested that NMFS could have used damped cylindrical spreading model (DCSM; Lippert *et al.*,

2018) and the source levels provided by TDFD PDSM; however, for reasons described herein, NMFS has determined JASCO's model results are reliable and achievable.

Recent measurements taken during the Coastal Virginia Offshore Wind (CVOW) Pilot Project reported the range to the marine mammal Level B threshold (160 dB re 1 μ Pa) from the 7.8-m pile installed with a double big bubble curtain to be 3,891 m (12,765.75 ft) when using a hammer operating at a maximum of 550 kJ (WaterProof, 2020). JASCO's model prediction for 11-m piles using a 4,000 kJ hammer is 4,684 m (15,367.45 ft). The Commission states that, based on the CVOW reported sound levels, JASCO's modeled predicted range should be more than double instead of only an approximate 20 percent increase because Ocean Wind's hammer has up to approximately five times more energy (550 kJ vs 4,000 kJ). NMFS disagrees. The 3,891-m distance to the Level B harassment threshold measured during the CVOW Pilot Project cited by the Commission was obtained based on the maximum measured sound pressure level (RMS SPL), which is not an ideal statistic to base estimates of Level B harassment isopleths, as it is not representative of average operating conditions and represents one hammer strike. Further, small differences in the propagation environment could account for the ranges being more comparable than expected. Importantly, as described below, NMFS is also now in receipt of measurements from the South Fork project which indicate JASCO's predicted distance to the Level B harassment threshold is realistic and attainable. Based on the expected variance between the Ocean Wind 1 and CVOW projects and measurement data from South Fork (see below), it cannot be concluded that the CVOW measured results (using the maximum RMS SPL reported) indicate that JASCO's 4,684 m modeled distance to Level B harassment threshold should be increased.

Importantly, since the proposed rule phase, NMFS has received interim sound field verification reports from the South Fork Wind project, which used JASCO's modeling. In all but one case, and out of six 7–8/9.5-m tapered piles installed, the measured distances to NMFS' Level B harassment threshold were lower than JASCO's model predicted. The distance to NMFS Level B harassment threshold was modeled as 4,684 m while *in-situ* measurements identified distances, excluding the one aforementioned pile, ranging from 1.84 kilometers (km) to 3.25 km. JASCO's modeling predicts the distances to the

Level B harassment threshold installation of Ocean Wind 1 monopiles will be approximately 3.3 km in summer, which aligns with the South Fork Wind results. South Fork Wind determined that the one pile generating noise levels above those predicted (the first pile) did so due to a malfunctioning noise attenuation system which was quickly rectified and deployed appropriately on all future piles. Further, in this final rule, we are requiring Ocean Wind's measured sound levels do not exceed those modeled, assuming 10 dB, for at least three consecutively measured monopiles. Based on all these reasons, NMFS is not requiring Ocean Wind to remodel the harassment zone sizes by adding 3 dB to the source levels and is, instead, carrying forward the modeling results as presented in the proposed rule.

Of note, NMFS has also received interim sound field reports from Vineyard Wind. However, some of the assumptions used in the modeling (e.g., maximum hammer energy) do not align with the construction parameters Vineyard Wind is currently using in the field, so comparisons between the modeled and measured results are not as directly applicable and, therefore, are less useful in judging predicted alignment between modeled and measured zones.

Based on this discussion and given our consideration of the available SFV reports from other projects, we disagree with the suggestions made by the Commission. NMFS has incorporated the best available scientific information into this final rule, using recent measurements as well as estimates obtained through JASCO's modeling.

Comment 2: The Commission suggested that JASCO should consider revising its exposure modeling to include single-day simulations for stationary, discrete sound sources and numerous Monte Carlo simulations (e.g., at least 30) for modeling reports for future rules.

Response: JASCO typically uses 7-day simulations to get a representative sample of the installation process (e.g., impact piling every day or every other day). From those 7-day simulations, several 24-hour windows within the 7-day simulations are used to find the average exposure expected in a 24-hour period that includes impact pile driving. The average 24-hour estimates are then scaled by the number of days of impact pile driving. The use of the 7-day simulation allows for a robust probability calculation. The Commission recommends that, instead, JASCO run 30 single-day simulations to

generate an average daily exposure. While NMFS makes recommendations, as appropriate, regarding the inputs, assumptions, and methods used by applicants to model and estimate marine mammal take, there is no single correct overall methodology. The Commission does not provide any information to support an assertion that the method used by JASCO is not appropriate or sufficient, and NMFS supports the use of this methodology.

Furthermore, it is unclear what the Commission means by "stationary, discrete sound sources." If the sources referred to are the monopiles or pin piles, then JASCO's modeling approach does use a Monte Carlo approach for sampling the expected sound fields. With the typical modeling density of 0.5 simulated animals (animats)/km², there are usually tens of thousands of animats meaning there are tens of thousands of Monte Carlo samples. If the suggestion is to run the simulations (with tens of thousands of animats) 30 times, that is equivalent to increasing the modeling density by 30. Previous work, such as the work done by Houser (2006), has indicated that such high modeling densities are not necessary. Please refer to NMFS' related response to Comment 5.

Comment 3: Citing the dire situation of North Atlantic right whales, a commenter stated that NMFS should clearly describe in the regulations or LOA for wind projects that the activities cannot result in any Level A harassment, serious injury, or mortality of North Atlantic right whales.

Response: The proposed rule clearly states that no take of North Atlantic right whale by Level A harassment, mortality, or serious injury was requested or proposed for authorization (see the Estimated Take and Negligible Impact Analysis and Determination sections in the proposed rule), and those statements are also included in this final rule. In this final rule, for example, Tables 33 and 34 shows that only Level B harassment is authorized for North Atlantic right whales, and the North Atlantic right whale sub-section in the Negligible Impact Analysis and Determination section also states that no take of North Atlantic right whale by Level A harassment, mortality, or serious injury is anticipated or authorized and any take that is authorized is limited to Level B harassment only.

Comment 4: The Commission recommended that NMFS authorize Level A harassment takes for group size for minke whales and both bottlenose dolphin stocks from UXO/MEC detonations in the final rule.

Response: We agree that there is some small potential for these smaller species to be exposed to noise levels that may cause PTS. Therefore, in this final rule, NMFS has conservatively authorized additional takes by Level A harassment of both bottlenose dolphins stocks and minke whales from UXO/MEC detonation. Using Ocean Wind's group size information, NMFS has increased the amount of take by Level A harassment from UXO/MEC detonations from 0 in the proposed rule to 11 for each stock of bottlenose dolphins, and from 0 in the proposed rule to 2 for minke whales.

Comment 5: The Commission recommends that NMFS: (1) require Ocean Wind to revise its take estimates for impact installation of monopiles and pin piles based on an animat density that is greater than any species specific, real-world density and the possibility that only a single monopile is installed per day rather than two per day, and (2) increase the takes by Level A harassment of humpback whales to mean group size for OSS impact installation.

Response: The Commission cites two of the assumptions in the take estimate methodology that could push the take estimate in the direction of less than the maximum expected takes. However, there are multiple other assumptions in the take estimate methodology that consider conditions that would result in the maximum possible takes, or even an overestimate of possible takes. When all of these assumptions are considered together, NMFS expects the take estimate model and methodology to produce the maximum take that is expected to occur incidental to the specified activities.

While Ocean Wind has acknowledged that it may not install two piles every day, it has indicated it is capable of installing up to two piles per day with the goal to complete installation as quickly as possible. Hence, to assume only one monopile per day every day would not be consistent with what Ocean Wind, a company with offshore wind farm installation experience, has indicated is possible or is planned. The exposure estimates contained within the proposed rule are a product of modeling that assumes two piles are driven per day. There are several conservative assumptions that offset the potential to underestimate take should Ocean Wind not be able to install two piles per day every day, including, but not limited to, all piles are installed during 30 days of the highest density month and 19 days (38 piles) of the second-highest density month for each species from May to December. This is conservative because

pile driving every day within a given month is not possible due to historical weather patterns and potential technical issues that may be encountered and the highest density of every species does not occur in the same month. It is more likely that pile driving will occur over several months which have lower marine mammals species density. Additionally, for some species, group size or PSO data adjustments were made that increased the number of takes authorized compared to the modeled exposure estimates. Furthermore, the exposure estimates modeled and number of takes authorized do not consider natural avoidance of marine mammals to noise levels that could elicit PTS or the use of mitigation such as shutdown or clearance zones, which are designed to effect the least practicable adverse impact on marine mammals, including North Atlantic right whales (*e.g.*, pile driving may not commence and must shut down if a North Atlantic right whale is observed at any distance). Finally, while Ocean Wind may use monopiles for OSS foundations, NMFS has used the pin pile take estimates in the total take authorized. The exposure estimates for pin piles is greater for all species than the exposures estimated for monopiles installation.

Regarding density seeding, the Commission asserts that when a model's density seeding is lower than the real-world density and, as here, 7-day simulations are used (as opposed to using 1-day simulations that are run 30–50 times, as is the case in other models), there is a chance that the model could miss consideration of a rarer event, resulting in a lower than maximum take estimate. As noted by the Commission, for common bottlenose dolphins, the real-world density (0.51) is higher than the density seeded (0.50) in the model. The use of the 0.5 animats/km² for all species is to robustly sample (with tens of thousands of animats) the expected sound fields, providing statistically reliable results. Typically the real-world density is much lower than this modeled density and the number of real-world individual animals is found by scaling the number of animats exceeding a threshold by the ratio: real-world density/modelled density. That, rarely, the real-world density may exceed the modeled density, in this case 0.51 versus 0.50 animats/km², does not change the process or the statistical reliability of the results. While the Commission's assertion that, if this were the only factor considered, the fact that the actual density is higher than the seeded density could result in a lesser

likelihood that the model would capture circumstances representing a rare event that might result in higher take may be true—in this case, the degree of difference is a real-world density of 0.51 versus a seeded density of 0.50. Additionally, as described above, there are numerous other conservative assumptions in the model such that, when considered together, support NMFS assessment that the number of takes authorized represents the maximum number of takes expected to occur incidental to the specified activities.

For these reasons, NMFS disagrees with the Commission's assessment that the take is underestimated and believes that the Commission's suggestion to double the number of takes authorized as a simplistic solution to their perceived issue would unnecessarily overestimate take. Please see NMFS related response to Comment 2.

NMFS agrees with the Commission's recommendation to increase the amount of Level A harassment of humpback whales to a group size during OSS foundation installation given the more frequent sightings of the species recently off of New Jersey. Based on the 2021–2022 monitoring report the Commission referenced, we have increased the amount of take by Level B harassment of humpback whales to 46 for OSS foundation installation. However, we emphasize that the majority of humpback whale sightings described by the Commission occurred in winter and this rulemaking includes a prohibition on foundation installation January 1 through April 30 (as impact pile driving may only occur in December with prior NMFS approval). All other foundation installation take estimates follow the approach as described in the proposed rule.

Comment 6: The Commission recommended that NMFS increase the Level B harassment takes for common dolphins and Atlantic white-sided dolphins incidental to cable landfall construction to a mean group size.

Response: Despite the nearshore location of cable landfall construction, vibratory installation and removal versus the more offshore distribution of these species, as well the short duration of vibratory pile driving, which suggests take of these species is very low, NMFS has accepted the Commission's recommendation as a conservative approach. The final rule includes 30 takes by Level B harassment of common dolphins and 12 takes by Level B harassment of Atlantic white-sided dolphins from cable landfall activities, based on group size information from AMAPPS.

Comment 7: The Commission recommended that NMFS determine if the Department of the Navy's (2017) group size estimates are more appropriate or reflective of the expected group size estimates for the Project than those used in the proposed rule. If so, the Commission suggests the take numbers be amended in the final rule for all Ocean Wind's activities.

Response: We appreciate the suggestion by the Commission to review the Department of the Navy's (2017) group size estimates to see if they are more applicable for the Project. Based on our review, we disagree that the Navy's group size estimates are the most applicable in this case. First, the Navy only provides group size estimates for odontocetes, which means we would still need to find applicable estimates for non-odontocete species found in the Atlantic Ocean. Second, the group sizes provided by Ocean Wind used information by Toth *et al.* (2011) for coastal bottlenose dolphins; Kenny and Vigness-Raposa (2010) for sei whales, minke whales, Atlantic spotted dolphins, and pilot whale *spp.*; CeTAP (1982) for humpback whales; and Barkaszi and Kelly (2019) for sperm whales and Risso's dolphin, which are derived from data gathered specifically in the mid- and north-Atlantic, where the Project will occur, whereas the group sizes in the Department of the Navy's (2017) report are based on data collected more broadly across the entire East Coast of the United States and Canada, including the Gulf of Mexico, Sargasso Sea, Labrador Sea, and Labrador Basin. Any additional takes that NMFS has opted to authorize, per recommendations by the Commission, is based on either the group size literature already provided by Ocean Wind (*e.g.*, from Toth *et al.*, 2011 for corrections to bottlenose dolphins) or based on group size information from AMAPPS, which derived data for its annual reports from specific transects undertaken in specific regions (New Jersey through Maine, per Figure 1–1 in the 2021 Annual Report, <https://repository.library.noaa.gov/view/noaa/41734>). Furthermore, AMAPPS uses more recent information, as demonstrated in the 2010–2021 annual reports found on NMFS' web page (<https://www.fisheries.noaa.gov/new-england-mid-atlantic/population-assessments/atlantic-marine-assessment-program-protected>). The Department of the Navy's (2017) group sizes are based on data from 1990 through 2013 (see Table 3–1 in the report). Lastly, based on monitoring reports received from PSOs in the field (and found on NMFS' website: <https://>

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable-expired-authorizations), the group sizes observed align more with estimates found in Kraus *et al.* (2016) and AMAPPS (Palka *et al.*, 2017). For these reasons, the group sizes proposed by Ocean Wind, any adjustments using AMAPPS data, and any group sizes used in the proposed and final rules are based on the best available scientific information.

Comment 8: The Commission recommended that NMFS include in the final rule Level B harassment takes of the coastal stock of bottlenose dolphins during impact installation of monopiles and pin piles, if any pile will be installed in 20 m of water or less or if any Level B harassment zone extends into 20 m or less of water.

Response: Based on the recommendation by the Commission, JASCO has seeded the coastal bottlenose dolphin stock only in shallow water (defined here as any area less than 20-m water depth). In consultation with Ocean Wind, NMFS has reallocated a conservative 10 percent of the offshore bottlenose dolphin Level B harassment take request to the coastal stock, which revises the authorized take from impact pile driving of permanent foundations to 842 takes by Level B harassment for the offshore stock and 94 takes by Level B harassment for the coastal stock.

We note that no take by Level A harassment of this coastal bottlenose dolphin stock has been authorized as, based on Figure 1 of the Underwater Acoustic and Exposure Modeling Report, all project foundations in the Lease Area will be installed beyond the 20-m isobath. The largest 10-dB attenuation exposure range for the project is approximately 3.5 km. The distance between the shallowest foundation position and shallow water is about this distance or less; thus, it is unlikely that the coastal stock would approach the piles during impact pile driving for the duration necessary to experience Level A harassment.

Comment 9: The Commission disagreed that non-auditory injury and mortality during UXO/MEC detonations are considered *de minimis*. It stated that although non-auditory injury and mortality could be unlikely, these outcomes are not *de minimis* because these assumptions were based off Bellmann *et al.* (2020) and Bellmann (2021) and their reports of bubble curtain effectiveness, which are based on information obtained from mitigating UXO/MECs in European waters using a big bubble curtain. The Commission

further stated that these results from Bellmann are only potentially possible if the single or double bubble curtain was optimized for the environmental conditions and that these results are specific to European charges, which may not be representative of charges in the United States as charges in Europe have been degrading in the water for approximately 75 years, which compromises the integrity of the trinitrotoluene (TNT)-equivalent material. Additionally, the charge weights described in Bellmann (2021) are much smaller than those described for the Project (*i.e.*, 100 grams (g), 5 kilograms (kg), and 10 kg, compared to 454 kg). The Commission also added that the shockwave from the UXO/MEC detonations may displace or disrupt the bubble curtains due to the speed the shockwave travels (*i.e.*, supersonic). Because of these reasons, the Commission recommended that NMFS re-estimate the distances to threshold and the mitigation and monitoring zones for mortality, Level A harassment, and Level B harassment based on 0-dB of sound attenuation.

The Commission also stated that it does not make sense to say that behavioral harassment will not result from exposure to single detonations of UXO. The Commission also recommended that NMFS re-estimate the number of takes from UXO/MEC detonation while increasing to the relevant group sizes, when necessary. Finally, the Commission recommended that because of the reasons already explained regarding attenuating UXO/MEC detonations, NMFS should require that Ocean Wind utilize a double big bubble curtain (DBBC) during all detonations and that NMFS not allow Ocean Wind to detonate UXOs/MECs when currents are moving faster than 2 knots (kn).

Response: NMFS appreciates the Commission's recognition that European waters offer a different environment than the Atlantic Ocean, and then the conditions and size of explosives potentially encountered in the Ocean Wind project area. Bellmann (2021) summarized findings from Bellmann *et al.* (2021) that showed use of a single big bubble curtain during UXO/MEC detonation reduced noise levels by 11 dB for broadband sound exposure levels and up to 18 dB for peak sound pressure (L_{pk}). While NMFS agrees with the Commission's comment that BBCs attenuate high-frequency (HF) sound (<1 kHz) more efficiently than low-frequency (LF) sound (Bellmann *et al.*, 2020) that corresponds to most of the UXO/MEC energy, the broadband attenuation is expected to be similar, if

the bubble curtain radius is large enough to avoid nearfield effects of the explosive detonations. While it is true that theoretical explosive spectra are flat at low frequencies and decay at high-frequencies, there remains significant energy at frequencies at which bubble curtains have been shown to be effective (Bellmann *et al.*, 2020). A recent study of UXO/MEC detonations in the North Sea (Robinson *et al.*, 2022) showed that measured spectra at 5.1 km had the majority of its energy between 32 and 250 Hz, in this range, the insertion loss data from Bellman (2021) has a minimum attenuation of approximately 16.8 dB in the 50-hertz (Hz) band, and is greater than 20 dB for all other bands. Further, Verfuss *et al.* (2019) summarize the effectiveness of bubble curtains on UXO/MEC detonations beyond those sizes considered in Bellman *et al.* (2021) which, while variable, provide support for the 10-dB broadband assumption when bubble curtains are deployed correctly (*i.e.*, with a sufficiently large diameter, to suppress the flow of displaced water). Therefore, the choice of 10 dB as a broadband attenuation for UXO/MEC detonations in our analysis is expected to be appropriate.

In addressing the Commission's additional comments regarding mitigating pile driving and UXO/MEC detonations and the efficacy, the physical principles of inserting an impedance change between the source and farther receivers is the same whether the source is an explosive or a pile. It is important, however, that the bubble curtain be placed outside of the region where the explosive causes nonlinear changes in the medium. While we do agree that "the deployment" and the "efficacy" are not synonymous terms, there will be a deployed bubble curtain on each of the piles driven for the project so an understanding of bubble curtain deployment strategies, maintenance, and use will be understood by the operations team. As above, the mechanism of sound attenuation, while frequency dependent, does not change for the source as long as the bubble curtain is deployed at distance where the acoustics is linear. For UXOs/MECs, the distances to thresholds for different sized charges likely to be encountered were calculated by JASCO assuming the sources were full strength and not degraded due to time. While the Commission has also accurately stated that the bubble curtain could be displaced due to the supersonic shockwave produced by the detonation event, we acknowledge that this would require the bubble curtain to be placed

in the area outside of the non-linear zone.

NMFS is requiring Ocean Wind to meet the noise levels modeled assuming 10-dB attenuation, which must be verified by SFV, and, as recommended by the Commission, is requiring Ocean Wind deploy a double big bubble curtain during all UXO/MEC detonations. Further, we are requiring that the bubble curtain be placed at a distance such that the nozzle hose remains undamaged. Given the best available science suggests 10-dB attenuation is achievable, the additional information provided above by JASCO, the requirement to meet the noise levels modeled assuming 10 dB, and the requirement to use a double big bubble curtain, as well as the extensive monitoring requirements associated with the clearance requirements (including aerial surveys if the clearance zone is greater than 5 km), NMFS has not adjusted any distances to thresholds or take estimates assuming no noise attenuation. At this time, NMFS is not requiring UXO/MEC detonation be limited to times when current speed is 2 kn or less but, as described above, is requiring Ocean Wind to meet the noise levels modeled. Should SFV identify that noise levels are not being met, NMFS will consider the current conditions during detonation and determine if such a measure is necessary to meet the noise levels modeled assuming 10-dB attenuation. Nonetheless, regarding the Commission's comment about use of the term "*de minimis*" to describe the likelihood of non-auditory injury or mortality, we concur that "unlikely" is a better descriptor and have changed it in the text where appropriate.

Regarding the Commission's comments regarding behavioral disturbance resulting from single detonations from UXO/MEC, NMFS agrees there is potential for behavioral disturbance from a single detonation per day and this impact is accounted for with the Level B harassment takes authorized from UXO/MEC detonations. NMFS acknowledges the possibility that single underwater detonations can cause a behavioral response. The current take estimate framework allows for the consideration of animals exhibiting behavioral disturbance during single explosions as they are counted as "taken by Level B harassment" if they are exposed above the temporary threshold shift (TTS) threshold, which is 5-dB higher than the explosive behavioral harassment threshold. The behavior threshold for underwater detonations of 5 dB less than the TTS thresholds for each functional hearing group that the

Commission identifies in its comment is only applicable to multiple detonations per day. We acknowledge in our analysis that individuals exposed above the TTS threshold may also be harassed by behavioral disruption and those potential impacts are considered in the negligible impact determination. NMFS is not aware of evidence to support the assertion that animals will have behavioral responses that would qualify as take to temporally and spatially isolated explosions at received levels below the TTS threshold. However, if any such responses were to occur, they would be expected to be few and to result from exposure to the somewhat higher received levels bounded by the TTS thresholds and would thereby be accounted for in the take estimates. The derivation of the explosive injury criteria is provided in the 2017 technical report titled "Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)."

In the proposed rule, we did inadvertently include UXO/MEC detonations as an example impulsive source in one location when referencing the 160-dB Level B harassment threshold, which has been removed in this final rule. We have also clarified that given Ocean Wind would be limited to detonating one UXO/MEC per day, the TTS thresholds provided in Table 5 are used to estimate the potential for Level B (behavioral) harassment. In both the proposed rule and this final rule, NMFS applied the TTS threshold to determine the received level at which Level B harassment (which includes both behavioral responses and TTS) may occur. Hence, no adjustments to take estimates is necessary.

Mitigation

Comment 10: Commenters recommended that NMFS require Ocean Wind to implement the best commercially available combined NAS technology to achieve the greatest level of noise reduction and attenuation possible for pile driving. A commenter recommended that NMFS require, at a minimum, a 10-dB reduction in SEL, but other commenters recommended that NMFS require a minimum of 15-dB or greater reductions, citing to successes described in Bellman *et al.* (2020 and 2022) and recommended "state-of-the-art" methods using a combination of two NAS systems simultaneously. A commenter further stated that NMFS should require field measurements to be taken throughout the construction process, including on the first pile installed, to ensure compliance with noise reduction requirements. A

commenter also suggested that NMFS require Ocean Wind to use HRG acoustic sources at the lowest practicable source levels needed to meet the objectives of the site characterization surveys.

Response: NMFS agrees with the suggestion made by the commenters that underwater noise levels should be reduced to the greatest degree practicable to reduce impacts on marine mammals. As described in both the proposed and final rule, NMFS has included requirements for sound noise attenuation methods that successfully (as evidenced by required sound field verification measurements) reduce real-world noise levels produced from impact pile driving of foundation installation to, at a minimum, the levels provided by JASCO modeled for 10-dB reduction, as analyzed in the proposed rule. Preliminary sound measurements from South Fork Wind, also an Orsted project, indicate that with multiple NAS systems, measured sound levels during impact driving foundation piles using a 4,000 kJ hammer are below those modeled assuming a 10-dB reduction and suggest, in fact, that two systems may sometimes be necessary to reach the targeted 10-dB reductions. While NMFS is requiring that Ocean Wind reduce sound levels to match the model outputs analyzed (assuming a reduction of 10 dB), we are not requiring greater reduction as it is currently unclear (based on measurements to date) whether greater reductions are consistently practicable for these activities, even if multiple NAS systems are used.

In response to the recommendation by the commenters for NMFS to confirm that a 10-dB reduction is achieved, NMFS clarifies that, because no unattenuated piles would be driven, there is no way to confirm a 10-dB reduction; rather, *in-situ* SFV measurements will be required to confirm that sound levels are at or below those modeled assuming a 10-dB reduction.

Regarding the recommendation that Ocean Wind should utilize its HRG acoustic sources at the lowest practicable source level to meet the survey objective, NMFS agrees with this suggestion and has incorporated this requirement into the final rule.

Comment 11: To minimize the risk of vessel strikes for all whales, and especially in recognition of the imperiled state of North Atlantic right whales, commenters recommended that NMFS require a mandatory 10-kn speed restriction for all project vessels (including PSO survey vessels) at all times, except for reasons of safety, and

in all places except in limited circumstances where the best available scientific information demonstrates that whales do not occur in the area. Other commenters made the same recommendation but suggested no exceptions. Alternatively, some suggested that project proponents could work with NMFS to develop an "Adaptive Plan" that modifies vessel speed restrictions if the monitoring methods are proven to be effective when vessels are traveling 10 kn or less. Commenters stated that this Adaptive Plan must follow a scientific study design. A commenter suggested that if the Adaptive Plan is scientifically proven to be equally or more effective than a 10-kn speed restriction, that the Adaptive Plan could be used as an alternative to the 10-kn speed restriction.

Response: NMFS agrees with the commenters that vessel strikes pose a risk to North Atlantic right whales (and all large whales broadly). Based on the density information provided by Roberts *et al.* (2023), most large whale species are less frequently found within the project area during the months when foundation installation, which requires the use of multiple vessels, would occur (*i.e.*, May through November, and December, if approved by NMFS). Specifically in the New Jersey region, there is no ESA critical habitat or areas wherein large whales are expected to congregate or remain in the area for extended periods of time (*e.g.*, no foraging biologically important areas (BIAs) are located within the project area; thereby, decreasing the time over which they are available to interact with vessels). Furthermore, while we do acknowledge that there is no time of year when North Atlantic right whales are not found within the Project area at all, NMFS, as described in the proposed rule and included in this final rule, is requiring Ocean Wind to reduce speeds to 10 kn or less in several circumstances when North Atlantic right whales are known to be present or more likely to be in the area, which include, but are not limited to, all Slow Zones (Dynamic Management Area or acoustic Slow Zone), from November 1–April 30 in the specified geographical region, and if a North Atlantic right whale is detected visually or acoustically in the project area. Additionally, aside from any requirements of this rule, Ocean Wind is required to comply with all spatial and temporal speed restrictions outlined in applicable regulations. Altogether, these speed requirements align with the commenter's recommendation.

The required mitigation measures, all of which were included in the proposed

rule and are now required in the final rule, can be found in § 217.264(b) of the regulatory text. These contain speed restriction requirements, vessel actions in the event mothers and calves/pods approach the vessel (*e.g.*, shifting into neutral, *etc.*), separation distances for specific species, and actions to take in the event marine mammal(s) are sighted, among other requirements. For the final rule, NMFS has also included a requirement that all vessels be equipped with automatic identification system (AIS) to facilitate compliance checks with the speed limit requirements. Per the proposed rule, on July 19, 2023, Ocean Wind submitted a draft Vessel Strike Avoidance Plan to NMFS for review and approval. At least 180 days prior to when the Project would seek to travel above 10 knots and deploy PAM buoys (anticipated in spring 2024), Ocean Wind must submit a PAM plan to NMFS for review and approval. Without an approved PAM Plan for the transit corridor in place, Ocean Wind would not be able to travel over 10 kn.

While NMFS acknowledges that vessel strikes can result in injury or mortality of marine mammals, we have analyzed the potential for vessel strike resulting from Ocean Wind's activity and have determined that based on the required mitigation measures specific to vessel strike avoidance included in the final rule and issued LOA, which are designed to effect the least practicable adverse impact on marine mammals, the potential for vessel strike is so low as to be discountable and no vessel strikes are expected or authorized.

Additionally, based on this information, we have determined no blanket 10-kn vessel-speed restriction is necessary.

Comment 12: Commenters recommended that NMFS should prohibit pile driving during periods of highest risk for North Atlantic right whales, which they defined as times of the highest relative density of animals during foraging and migration, and times where cow-calf pairs, pregnant females, surface active groups (that are foraging or socializing), or aggregations of three or more whales, are not expected to be present. Citing multiple information sources, commenters further specifically recommended the seasonal restriction for pile driving be expanded to November 1 through April 30 to reflect the period of highest detections of vocal activity, sightings, and abundance estimates of North Atlantic right whales. Commenters recommended prohibiting pile driving during seasons when protected species are known to be present or migrating in the Project area, in addition to any

dynamic restrictions due to the presence of North Atlantic right whale or other endangered species. Also, for UXO/MEC detonations, a commenter implied that the seasonal restrictions from January 1 through April 30, annually, are not enough to protect North Atlantic right whales but did not recommend specific times of year when pile driving and UXO/MEC detonation should not occur.

Response: NMFS has restricted foundation installation pile driving from January through April, which represent the times of year when North Atlantic right whales are most likely to be in the project area. We recognize that the density of whales begins to elevate in December; however, it is not until January when density greatly increases. Ocean Wind has indicated that to complete the project, pile driving in December may be required. In this final rule, NMFS has included an additional measure wherein pile driving in December must be avoided to the maximum extent practicable but may occur if necessary, provided NMFS prior approval. In any time of year when foundation installation is occurring, a sighting or acoustic detection of a North Atlantic right whale at any distance triggers a pile driving delay or shutdown. We also reiterate that Ocean Wind is required to implement a minimum visibility zone in December (2,500 m) as compared to other project months (1,650 m), reflecting the results of JASCO's underwater sound propagation modeling. With the application of these enhanced mitigation and monitoring measures in December, impacts to the North Atlantic right whale will be further reduced, if any are encountered when transiting through the Migratory Corridor.

Regarding further restrictions on pile driving in the month of November, as noted in the comments and supporting information, and acknowledged by NMFS in both the proposed and final rules, North Atlantic right whale distribution is changing due to climate change and other factors, and they are present year round in the vicinity of the project, with some detections of mothers with calves or feeding behaviors in the vicinity of the project. However, as shown in Roberts *et al.* (2023), which NMFS considers the best available scientific information regarding marine mammal densities in the Atlantic Ocean, it is not until January that densities begin to significantly increase. Further, North Atlantic right whales are not likely to be engaged in feeding behaviors in the project area, from May to November or otherwise, as the project area is primarily a migratory corridor for North Atlantic right whales and, while

some opportunistic foraging may occur, the waters off of New Jersey do not include known foraging habitat for North Atlantic right whales. As described in the Marine Mammal section, foraging habitat is located in colder, more northern waters including southern New England, the Gulf and Maine, and Canada. For these reasons, and given the inclusion of December in the seasonal impact pile driving restriction, except with NMFS prior approval, NMFS finds that further expansion of the seasonal impact pile driving restrictions (beyond December–April) is unwarranted.

Inasmuch as comments may be suggesting that NMFS prohibit pile driving when any protected species are present, it would not be practicable to implement, as there is no time of year when some species of marine mammals are not present.

Regarding a commenter's assertion that the January to April pile driving and UXO/MEC detonation moratorium is insufficient, the commenter did not propose a different time period or moratorium for NMFS to evaluate and consider for this final rule. In the proposed rule, we acknowledged that Ocean Wind had committed to not detonating UXOs/MECs from November 1 through April 30, annually, to reduce impacts to the North Atlantic right whale, and we have carried that requirement forward here in the final rule.

Comment 13: A commenter recommended that, for site assessment surveys, NMFS: (1) increase the size of the clearance and shutdown zones for site assessment surveys to 500 m for all large whales and 1,000 m for North Atlantic right whales, respectively; (2) require a 1,000-m acoustic clearance zone (*i.e.*, necessitating the use of PAM for HRG surveys); and (3) require that any unidentified large whale within 1,000 m of the vessel be considered a North Atlantic right whale.

Response: As described in the proposed and final rules, the required 500-m Shutdown Zone for North Atlantic right whales exceeds the modeled distance to the largest 160-dB Level B harassment isopleth (141 m during sparker use) by a large margin, minimizing the likelihood that they will be harassed in any manner by this activity. For other ESA-listed species (*e.g.*, fin and sei whales), the NMFS Greater Atlantic Regional Fisheries Office (GARFO) 2021 Offshore Wind Site Assessment Survey Programmatic ESA consultation (see <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic>)

determined that a 100-m shutdown zone is sufficient to minimize exposure to noise that could be disturbing. Accordingly, NMFS has adopted this shutdown zone size for all baleen whale species, other than the North Atlantic right whale. Commenters do not provide additional scientific information for NMFS to consider to support their recommendation to expand the Shutdown Zone. Given that these surveys are relatively low impact and that NMFS has prescribed a precautionary North Atlantic right whale Shutdown Zone that is larger (500 m) than the largest estimated harassment zone (141 m), NMFS has determined that an increase in the size of the Shutdown Zone during HRG surveys is not warranted.

Regarding the use of acoustic monitoring to implement the shutdown zones, NMFS does not consider acoustic monitoring an effective tool for use with HRG surveys for the reasons discussed below and therefore has not required it in this final rule. As described in the Mitigation section, NMFS has determined that the prescribed mitigation requirements are sufficient to effect the least practicable adverse impact on all affected species or stocks.

The commenters do not provide additional scientific information for NMFS to consider to support their recommendation to require PAM during site assessment surveys. NMFS disagrees that this measure is warranted because it is not expected to be effective for use in detecting the species of concern. It is generally accepted that, even in the absence of additional acoustic sources, using a towed passive acoustic sensor to detect baleen whales (including North Atlantic right whales) is not typically effective because the noise from the vessel, the flow noise, and the cable noise are in the same frequency band and will mask the vast majority of baleen whale calls. Vessels produce low-frequency noise, primarily through propeller cavitation, with main energy in the 5–300 Hz frequency range. Source levels range from about 140 to 195 decibel (dB) re 1 μ Pa (micropascal) at 1 m (NRC, 2003; Hildebrand, 2009), depending on factors such as ship type, load, and speed, and ship hull and propeller design. Studies of vessel noise show that it appears to increase background noise levels in the 71–224 Hz range by 10–13 dB (Hatch *et al.*, 2012; McKenna *et al.*, 2012; Rolland *et al.*, 2012). PAM systems employ hydrophones towed in streamer cables approximately 500 m behind a vessel. Noise from water flow around the cables and from strumming of the cables themselves is also low frequency and

typically masks signals in the same range. Experienced PAM operators (Thode *et al.*, 2017) emphasized that a PAM operation could easily report no acoustic encounters, depending on species present, simply because background noise levels rendered any acoustic detection impossible. The same report stated that a typical eight-element array towed 500 m behind a vessel could be expected to detect delphinids, sperm whales, and beaked whales at the required range, but not baleen whales, due to expected background noise levels (including seismic noise, vessel noise, and flow noise).

Further, there are several additional reasons why we disagree that use of PAM is warranted for HRG surveys, specifically. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances (*e.g.*, foundation installation), its utility in further reducing impacts during HRG survey activities is limited. First, for this activity, the area expected to be ensonified above the Level B harassment threshold is relatively small (a maximum of 141 m); this reflects the fact that the source level is comparatively low and the intensity of any resulting impacts would be lower level and, further, it means that inasmuch as PAM will only detect a portion of any animals exposed within a zone, the overall probability of PAM detecting an animal in the harassment zone is low. Together, these factors support the limited value of PAM for use in reducing take for activities/sources with smaller zones. Also, PAM is only capable of detecting animals that are actively vocalizing, while many marine mammal species vocalize infrequently or during certain activities, which means that only a subset of the animals within the range of the PAM would be detected (and potentially have reduced impacts). Additionally, localization and range detection can be challenging under certain scenarios. For example, odontocetes are fast moving and often travel in large or dispersed groups which makes localization difficult.

Given that the effects to marine mammals from the types of HRG surveys authorized in this final rulemaking are expected to be limited to low level behavioral harassment even in the absence of mitigation, the limited additional benefit anticipated by adding this detection method (especially for North Atlantic right whales and other low frequency cetaceans, species for which PAM has limited efficacy during this activity), and the cost and impracticability of implementing a full-

time PAM program, we have determined the current requirements for visual monitoring are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat during HRG surveys.

Comment 14: Commenters recommended that NMFS require pile-driving clearance and shutdown zones for large whales (other than North Atlantic right whale) that are large enough to avoid all take by Level A harassment and minimizes Level B harassment to the most practicable extent.

Response: The commenters do not provide additional scientific information for NMFS to consider to support their recommendation to expand clearance and shutdown zones to effect the least practicable adverse impact on marine mammals, particularly large whales, excluding the North Atlantic right whale. The required clearance zone for large whales (other than North Atlantic right whale) equates to the largest modeled distance to the largest Level A harassment threshold, plus 20 percent, for the low frequency hearing group, assuming 10 dB of sound attenuation. The shutdown zone represents the largest distance to the cumulative sound exposure level (SEL_{cum}) for the Level A harassment isopleth. Both of these zones are typically rounded up for PSO clarity. These requirements minimize Level B harassment and avoid almost all Level A harassment of large whales (note that for all but minke whales ($n=22$), all other species of large whales have 6 or fewer takes by Level A harassment across all 5 years of the rule). Further enlargement of these zones could interrupt and delay the project such that a substantially higher number of days would be needed to complete the construction activities, which would incur additional costs, but importantly also potentially increase the number of days that marine mammals are exposed to the disturbance. Accordingly, NMFS has determined that enlargement of these zones is not warranted, and that the existing required clearance and shutdown zones support a suite of measures that will effect the least practicable adverse impact on other large whales.

Comment 15: Commenters recommended that NMFS require clearance and shutdown zones for North Atlantic right whales specifically, including: (1) a minimum of 5,000 m for the visual clearance, acoustic clearance, and shutdown zones in all directions from the driven pile location; and (2) an acoustic shutdown zone that would

extend at least 2,000 m in all directions from the driven pile location.

Response: The Commenters do not provide additional scientific information for NMFS to consider to support their recommendation to expand clearance and shutdown zones for impact pile driving to effect the least practicable adverse impact on North Atlantic right whales. The proposed rule and this final rule require impact pile driving to be delayed or shutdown if a North Atlantic right whale is visually or acoustically detected at any distance. Given NMFS neither anticipates nor authorizes any take by Level A harassment of North Atlantic right whales, NMFS believes that these measures will effect the least practicable adverse impact on the species. Delaying the project due to overly enlarged zone sizes would result in longer construction time frames, prolonging the time periods over which marine mammals may be exposed to construction-related stressors. Accordingly, NMFS has determined that enlargement of these zones is not warranted, and that the existing required clearance and shutdown zones support a suite of measures that will effect the least practicable adverse impact on North Atlantic right whales and other affected species.

Comment 16: For all large whale species, commenters recommended that NMFS require real-time PAM during impact pile driving to monitor the acoustic clearance and acoustic shutdown zones, and must assume a detection range of at least 10 km. They stated that this monitoring must be undertaken from a vessel other than the pile driving vessel or from a stationary unit to avoid masking of the hydrophone from the pile driving vessel or other development-related noise.

Response: As described in the proposed rule, NMFS is requiring the use of PAM to monitor 10-km zones around the piles, and that the systems be capable of detecting marine mammals during pile driving within this zone. However, NMFS acknowledges that this could be made clearer and has modified Table 36 to clearly describe this 10 km PAM monitoring zone. Ocean Wind is required to submit a PAM Plan to NMFS for approval at least 180 days prior to the planned impact pile driving start date. NMFS will not approve a Plan where hydrophones used for PAM would be deployed from the pile driving vessel as this would result in hydrophones inside the bubble curtains, which would clearly be ineffective for monitoring; therefore, there is no need to explicitly state in this rule that this

would not be allowed. Further, Ocean Wind may launch PAM drones from shore; hence, NMFS is not requiring that Ocean Wind deploy any monitoring systems from a vessel.

Comment 17: Comments recommended that NMFS: (1) require all offshore personnel to be trained to identify North Atlantic right whales and other large whales, and (2) that all vessels maintain a 500-m separation distance from North Atlantic right whale, 100 m for other large whale species while also maintaining a vigilant watch for North Atlantic right whale and other large whale species. Commenter(s) also recommended that NMFS require vessels to slow down or maneuver their vessels appropriately to avoid a potential interaction with a North Atlantic right whale and other large whale species. Commenter(s) also suggested that NMFS require that vessels maintain a separation distance from North Atlantic right whales.

Response: NMFS notes that these requirements were included in the proposed rule (87 FR 64868, October 26, 2022) and are carried forward into this final rule.

Comment 18: Commenters recommended that NMFS implement diel restrictions for site assessment and characterization activities within 1.5 hours of civil sunset and in low-visibility conditions when the visual clearance zone and shutdown zone (referred to as the “exclusion zone” in Appendix A) cannot be visually monitored by the Lead PSO.

Response: NMFS acknowledges the limitations inherent in visual detection of marine mammals at night. The proposed rule and this final rule requires that visual PSOs use alternative technology (*i.e.*, infrared or thermal cameras) during periods of low visibility to monitor the clearance and shutdown zones. We note that no Level A harassment is expected to result from exposure to HRG equipment, even in the absence of mitigation, given the characteristics of the sources planned for use (supported by the very small estimated Level A harassment zones; *i.e.*, <36.5 m (119.8 feet (ft)) for all sources). Regarding Level B harassment, any potential impacts are limited to short-term behavioral responses. Given these factors combined with other mitigation measures, NMFS has determined that more restrictive mitigation requirements are not warranted.

Restricting surveys in the manner suggested by the commenters may reduce marine mammal exposures by some degree at night if, in fact, detectability is less at night and animals

do approach within the small harassment zone, but would not result in any significant reduction in either intensity or duration of noise exposure over the course of the surveys. In fact, the restrictions recommended by the commenters could result in the surveys spending increased total time (number of days) on the water introducing noise into the marine environment, which may result in greater overall impacts to marine mammals; thus, the commenters have not demonstrated that such a requirement would result in a net benefit. Furthermore, restricting the ability of the applicant to begin operations only during daylight hours, which could result in the applicant failing to collect the data they have determined is necessary within the specific timeframe and, subsequently, may necessitate the need to conduct additional surveys in the future across additional days. This would result in significantly increased costs incurred by the applicant. Thus, the restriction suggested by the commenters would not be practicable for the applicant to implement. In consideration of the likely effects of the activity on marine mammals absent mitigation, potential unintended consequences of the measures as proposed by the commenters, and practicability of the recommended measures for the applicant, NMFS has determined that restricting operations as recommended is not warranted or practicable in this case.

Comment 19: Commenter recommended that NMFS prohibit site assessment and site characterization activities during times of highest North Atlantic right whale risk (foraging and migration, and times when mother-calf pairs, pregnant females, surface active groups, or aggregations of three or more whales, which is indicative of feeding or social behavior), using the best available science to define high-risk timeframes.

Response: NMFS neither anticipates, nor authorizes, take of North Atlantic right whales by Level A harassment from this activity. Furthermore, NMFS expects that the required Vessel Strike Avoidance and HRG mitigation measures will affect the least practicable adverse impact on the species from this activity. While NMFS is authorizing three total takes of three North Atlantic right whales by Level B harassment from HRG surveys over the 5-year effective period of this rulemaking, the required mitigation measures will affect the least practicable adverse impact on North Atlantic right whales. Specifically, the largest modeled Level B harassment zone size for the sparker (141 m) is already much smaller than

the required separation, clearance, and shutdown distances for North Atlantic right whale (500 m) and any unidentified large whale that would be treated as if it were a North Atlantic right whale. Any Level B harassment that is not avoided is not expected to impact feeding or other behaviors in a manner that poses energetic or reproductive risks for any individuals. Given the minimal anticipated impacts of the HRG survey, NMFS disagrees that additional mitigation measures are warranted.

Comment 20: A commenter suggested that all acoustic and visual monitoring must begin at least 60 minutes prior to the start of or re-start of pile driving and must be conducted throughout the entire duration of the pile-driving event. They also suggested that visual monitoring must continue for 30 minutes after pile driving has ceased.

Response: NMFS notes that the commenter's recommended mitigation measures were included in the proposed rule and carried forward in this final rule. The proposed rule also included a requirement that Ocean Wind review PAM data at least 24 hours immediately prior to pile driving for situational awareness, which has also been included in this final rule. NMFS notes that if monitoring continues throughout any pauses in pile driving after it commences, monitoring would not have to occur for 60 minutes; however, the clearance zones measures regarding not starting pile driving until the zones are clear would become applicable.

Comment 21: Commenters recommended that NMFS should restrict pile driving at night and during periods of low visibility to protect all large whale species. This would include no pile driving being allowed to begin after 1.5 hours before civil sunset or during times where the visual clearance zone and shutdown zone (called the "exclusion zone" in the Appendix) cannot be visually monitored, as determined by the Lead PSO.

If nighttime pile driving is to be allowed, the commenters recommended that NMFS require that pile driving be initiated no later than 1.5 hours prior to civil sunset at the latest, rather than 1.5 hours after civil sunset as stated in the proposed rule, in order to maximize monitoring activities during hours of optimal visibility/daylight. Impact pile driving started at least 1.5 hours prior to civil sunset during good visibility conditions can then continue after dark, as necessary providing the best available infrared technologies are used to support visual monitoring of the clearance and exclusion zones during periods of darkness (see Attachment 1).

A commenter did caveat this recommendation by stating that NMFS should only allow pile driving to continue after dark if the activity began during daylight hours and must continue for human safety or due to installation feasibility (*i.e.*, instability or pile refusal) but only if required nighttime monitoring protocols are followed.

A commenter suggested that if pile driving must continue after dark due to safety reasons, Ocean Wind should be required to notify NMFS with these reasons and an explanation for exemption. Additionally, a commenter stated that a summary of the frequency of these exceptions must be made publicly available to ensure that these are indeed exceptions, rather than the norm, for the project.

Response: NMFS recognizes the need to protect marine mammals that may be exposed to pile-driving noise, as well as the challenges of detecting marine mammals in low-light conditions. However, we note that while it may be more difficult to detect marine mammals at night, there are benefits to completing the pile driving in a shorter total amount of time, and exposing marine mammals to fewer days of pile-driving noise. On July 19, 2023, Ocean Wind submitted to NMFS a final Nighttime Pile Driving Plan. This plan includes use of multiple Electro-Optical/Infra-Red (E.O./IR) cameras with cooled sensors and 32-channel hydrophone arrays to conduct PAM for marine mammal detection at night which will maximize marine mammal detection during nighttime pile driving. With the implementation of this plan, Ocean Wind may conduct pile driving at night from June 1 through October 31, annually, as this is the period, based on the Roberts *et al.* (2023) data, where North Atlantic right whale densities are the lowest. We note that Ocean Wind will not be performing nighttime pile driving for every pile, nor even every day as pile driving will not occur every day. Further, some piles will be finished before hours of darkness and some piles may necessitate completion after dark due to safety and/or stability concerns. NMFS will continue to review reports submitted by Ocean Wind and will maintain the provision to implement adaptive management, if needed. Given the requirements of the nighttime plan, which increase the likelihood of detection and the effective implementation of the required mitigation, NMFS has determined that allowing nighttime pile driving in the identified months is appropriate. For those months when nighttime pile driving is not allowed, the requirement

has been corrected to indicate that initiation of pile driving must begin 1.5 hours prior to (not after) civil sunset, as we agree with the commenter and that was the intention in the proposed rule.

Regarding a commenter's suggestion for additional and specific reporting in the event that piles must be finished after dark due to safety and/or stability concerns, we do not agree that this measure would be either beneficial or necessary. This is a blanket provision necessary for the safety of the crew and vessels and do not see what benefit tracking this available provision would be. As described in the rule, Ocean Wind only intends to install a maximum of 2 piles per day, but may only install 1 pile on many days. Because of the limited duration of pile driving predicted, we do not expect that Ocean Wind finishing pile driving after civil sunset would be a common occurrence, necessitating the need for additional restrictions or specific reporting. Regarding the reporting requirement specified by the commenter, we note that we are already requiring weekly reports during foundation installation, which would contain information that would inform on how long impact pile driving occurred and if it was necessary for this activity to occur during hours of darkness (*i.e.*, information that would document the daily start and stop of all pile-driving activities). These weekly reports would be combined into monthly and annual reports. We do not plan to make the weekly or monthly reports publicly available, due to the number of reports that would become available; however, as described in Comment 25, we do plan to make the final reports available, which would summarize all of the information contained in the weekly and monthly reports.

Comment 22: A commenter recommended that NMFS not allow pile driving to begin if monitoring results in either an acoustic detection within the acoustic clearance zone or a visual detection within the visual clearance zone of one or more North Atlantic right whales. They also stated that pile driving should not be initiated or must be shut down if underway (with an exception noted due to pile stability and human safety) if monitoring results in an acoustic detection within the acoustic shutdown zone or a visual detection within the visual shutdown zone of one or more North Atlantic right whales. They added that if pile driving is underway and a North Atlantic right whale is visually detected at any distance from the pile by a PSO, pile driving must be shut down. A commenter also recommended NMFS

include a condition for resumption of pile driving after the Lead PSO confirms that no North Atlantic right whale or other protected species have been detected within the acoustical and visual clearance zones. Finally, a commenter acknowledged the exemption for safety from shutdown but recommends that if this exemption occurs, the project must immediately notify the NMFS with reasons and explanation for exemption and a summary of the frequency of these exceptions must be publicly available to ensure that these are the exception rather than the norm for the project. Some commenters also recommended that HRG surveys should be required to use a soft start, ramp-up procedure to encourage any nearby marine life to leave the area.

Response: The recommended requirement that any detection of a North Atlantic right whale (visually or acoustically in the associated clearance zone) during the clearance period would trigger a delay to the onset of pile driving was included in the proposed rule and is included in this final rule. Similarly, the recommended requirement that any detection of a North Atlantic right whale (visually or acoustically in the associated exclusion zone) while pile driving is occurring would trigger a shutdown of pile driving (with the noted safety exception) was included in the proposed rule and is included in this final rule. In this final rule, NMFS has also added the requirement that shutdown of pile driving must occur if a North Atlantic right whale is visually detected at "any distance." Regarding the resumption of pile driving following a shutdown, PSOs would be required to monitor clearance zones prior to impact pile driving starting. Impact pile driving would be allowed to begin only when the Lead PSO confirms that no North Atlantic right whales or other marine mammal species have been detected in the applicable clearance zones and the PAM operator confirms no detection of North Atlantic right whales. A soft-start to pile driving or ramp-up to HRG surveys would be required, as described in the proposed rule and also included in this final rule.

Regarding a commenter's suggestion that in the event that mitigation actions are not undertaken based on specific exemptions, both the proposed and final rules require reporting weekly, monthly, and annual reports where Ocean Wind must provide reasons why mitigation actions could not occur (including for this exception). We acknowledge the importance of transparency in the reporting process and plan to make all

final annual and 5-year marine mammal monitoring reports and final SFV report on our website, however, NMFS will not be making the weekly or monthly reports final given the amount of total reports that would be obtained over a 5-year period.

Comment 23: A commenter expressed concern regarding 8 hours of pile driving, daily, for monopile foundations as they state that there are "no clear provisions for enforcement of these and other restrictions" given the close proximity of other projects within the region.

Response: Specific to the Project, NMFS notes that this comment is unfounded, as no other projects will begin impact pile driving off New Jersey during the same period Ocean Wind would begin. However, in discussing the concern more broadly, it is not clear what the commenter means by stating that there are "no clear provisions for enforcement of these and other restrictions." The MMPA has a prohibition on the take of marine mammals and if Ocean Wind does not comply with the requirements of any issued LOA and their activities result in the take of marine mammals, then they will be subject to law enforcement. Violating the regulations and LOAs can result in civil and criminal penalties. More specifically, the developer is required to submit weekly and monthly reports to NMFS for review, that would detail exactly what was installed, what parameters of the impact hammer were used, and when piling began and ceased, among other things. Additionally, the applicant would provide SFV reports for NMFS' review to allow for a clear understanding as to the effectiveness of the sound attenuation measures and if additional action (*e.g.*, modification to clearance or shutdown zones) is needed.

Comment 24: A commenter stated that at first, UXOs/MECs must be evaluated to see if they can be moved without detonation. If detonation must occur, the commenter stated that the mitigation measures for pile driving should be observed the same with regards to including noise abatement technology, clearance zones, and the use of PSOs. If the impact area is larger than predicted after detonation, the commenter suggests that expanded mitigation measures should be implemented.

Response: As described in the proposed rule and included in this final rule, Ocean Wind would use the As Low As Reasonably Practical (ALARP) approach such that detonation would be the last resort to removing a UXO/MEC. That is, Ocean Wind is required to use detonation as a means of removing

UXO/MECs only if all other options of removal have been exhausted. Also as described in the proposed rule and included in this final rule, Ocean Wind would be required to implement visual monitoring using PSOs and PAM prior to detonation. These PSOs and PAM operators would be required to clear the appropriate zones prior to Ocean Wind detonating any UXO/MEC. The proposed rule also included the measure that SFV must be conducted on every UXO/MEC, which has been carried forward in this final rule. Additionally, NMFS requires that a double big bubble curtain must be used that is positioned far enough away from the blast such that the hose nozzles are not damaged.

Furthermore, NMFS notes that we retain the ability to modify existing mitigation measures through adaptive mitigation in the event new information becomes available and if doing so creates a reasonable likelihood of more effectively accomplishing the goal(s) of the measure.

Comment 25: A commenter asserted that the LOA must include requirements to hold all vessels associated with site characterization surveys accountable to the ITA requirements, including vessels owned by the developer, contractors, employees, and others regardless of ownership, operator, and contract. They stated that exceptions and exemptions will create enforcement uncertainty and incentives to evade regulations through reclassification and redesignation. They recommended that NMFS simplify this by requiring all vessels to abide by the same requirements, regardless of size, ownership, function, contract or other specifics.

Response: NMFS notes the proposed rule and this final rule includes a general condition that extends the requirements imposed on Ocean Wind to persons it authorizes or funds to conduct activities on its behalf (e.g., vessel operators) while conducting the specified activities. The rule also states that Ocean Wind must ensure that the vessel operator and other relevant vessel personnel, including the PSO team, are briefed on all responsibilities, communication procedures, marine mammal monitoring protocols, operational procedures, and rule requirements prior to the start of survey activity, and when relevant new personnel join the survey operations.

Comment 26: A commenter stated that the LOA must include conditions for the survey and construction activities that will first avoid adverse effects on North Atlantic right whales in and around the area and then minimize and mitigate the effects that cannot be avoided. This

should include a full assessment of which activities, technologies and strategies are truly necessary to achieve site characterization and construction to inform development of the offshore wind projects and which are not critical, asserting that NMFS should prescribe the most appropriate techniques that would produce the lowest impact while achieving the same goals while prohibiting those other tools/techniques that would cause more frequent, intense, or long-lasting effects.

Response: NMFS is required to authorize the requested incidental take if it finds such incidental take of small numbers of marine mammals by the requestor while engaging in the specified activities within the specified geographic region will have a negligible impact on such species or stock and where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. As described in this notice of final rulemaking, NMFS finds that small numbers of marine mammals may be taken relative to the population size of the affected species or stocks and that the incidental take of marine mammal from all of Ocean Wind's specified activities combined will have a negligible impact on all affected marine mammal species or stocks. It is not within NMFS' authority to determine the requestor's specified activities.

The MMPA requires that we include mitigation measures that will effect the least practicable adverse impact on the affected species and stocks. In practice, NMFS agrees that the rule should include conditions for the construction activities that will first avoid adverse effects on North Atlantic right whales in and around the project area, where practicable, and then minimize the effects that cannot be avoided. NMFS has determined that this final rule meets the requirement to effect the least practicable adverse impact on the affected marine mammal stocks and their habitat. The commenter does not make any specific recommendations regarding mitigation measures.

Monitoring, Reporting, and Adaptive Management

Comment 27: Several commenters recommended that NMFS increase the frequency of information review for adaptive management to at least once a quarter and also have a mechanism in place to undertake review and adaptive management on an ad hoc basis if a serious issue is identified (e.g., if unauthorized levels of Level A take of marine mammals are reported or if

serious injury or mortality of an animal occurs).

Response: NMFS may undertake review and adaptive management actions at any time under the regulations, as written. Ocean Wind is required to submit weekly, monthly, and annual reports that NMFS will review in a timely manner and may act on pursuant to the adaptive management provisions at any time, and therefore, a separate specific quarterly review is unnecessary.

Comment 28: A commenter recommended that NMFS require robust monitoring protocols during pre-clearance and when site assessment and characterization activities are underway, including: (1) passive acoustic monitoring from a nearby vessel (other than the survey vessel) or a stationary unit to avoid masking; (2) visual monitoring of the clearance zone for North Atlantic right whales and other large whales by four on-duty PSOs on each survey vessel scanning 180 degrees; and (3) visual and acoustic monitoring beginning 30 minutes prior to commencement or re-initiation of survey activities through the duration of the survey.

Response: Regarding the recommendation to require acoustic monitoring (in any form) to support clearance and shutdown requirements for HRG surveys, please see NMFS response to Comment 13, which describes why PAM is not warranted for HRG surveys. With respect to the number of PSOs, NMFS is not requiring four on-duty PSOs given the very small harassment zone sizes associated with HRG surveys. In the proposed rule, and in this final rule, PSOs are required to commence monitoring for marine mammals 30 minutes prior to the activity before HRG surveys begin; hence, this recommendation has already been satisfied.

Comment 29: A commenter recommended that NMFS require infrared technology to support visual monitoring for all vessels responsible for crew transport and during any pile-driving activities that occur in periods of darkness or nighttime to supplement the visual monitoring efforts for marine mammals. They additionally included a suggestion that additional observers and monitoring approaches (i.e., infrared, drones, hydrophones) must be used, as determined to be necessary, to ensure that monitoring efforts for the clearance and shutdown zones are effective during daytime, nighttime, and during periods of poor visibility.

Response: NMFS notes that most of the proposed recommendations were already included in the proposed rule

and have been carried forward here. Specifically, NMFS described in the proposed rule, and is requiring in the final rule, that infrared technologies and PAM hydrophone deployments be available and used before, during, and after pile driving. NMFS concurs with a suggestion by the commenter and has added a new requirement in the final rule to allow Ocean Wind to deploy drones to aid PAM efforts. Moreover, since publication of the proposed rule, Ocean Wind has submitted a nighttime pile driving plan (referred to as the Alternative Monitoring Plan) on July 19, 2023 that includes advanced technologies for monitoring marine mammals at night for both trained crew observers and PSOs. Once approved, NMFS will make the plan available on our website at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>.

Comment 30: Some commenters recommended that additional monitoring of the visual clearance and shutdown zones must be undertaken by PSOs located on the pile-driving vessel and on an additional vessel that would circle the pile-driving site. They specified that a minimum of four PSOs must be on each vessel and must have two PSOs monitoring per shift operating on a two on, two off rotation, with the commenter suggesting that human observation be supplemented with IR technology and drones.

Response: In the proposed rule, NMFS proposed to require two on-duty PSOs on the pile-driving vessel and two on-duty PSOs on the secondary vessel, each covering 180 degrees, as proposed by a commenter. However, since that time, NMFS has determined that there are too few observers and is now requiring three on-duty PSOs on both platforms such that each PSO is responsible for 120-degree coverage, increasing detection effectiveness.

Comment 31: A commenter recommended that NMFS should require SFV during installation of WTG and OSS foundations on the first monopile installed and then on a random sample of monopiles throughout the installation process. They also noted that they do not support the installation of unmitigated piles. They added that all sound source validation reports for field measurements must be made publicly available after being evaluated by both NMFS and BOEM prior to the installation of any additional monopiles being installed.

Response: NMFS notes that the proposed rule and this final rule require

noise abatement systems to be deployed during all impact pile driving activities to reduce noise levels to the modeled harassment isopleths, which will be validated through SFV. Additionally, the proposed rule and this final rule require SFV for the first three piles and additional piles where conditions suggest noise levels may be higher or propagate farther than those piles previously measured. Ocean Wind has the Lease Area data to identify if a pile would be more difficult to drive than the initial piles measured. Given these mitigation measures, NMFS disagrees that random sampling is necessary.

As we describe above for Comment 22, we acknowledge the importance of transparency in the reporting process and plan to make all final SFV report on our website, however, NMFS will not be making any weekly or monthly final reports available, given the amount of total reports that would be obtained over a 5-year period. The SFV reports and information gleaned would be available in these final reports.

Comment 32: The Commission suggested that the monitoring measures included in the proposed rule may not be sufficient in reducing the potential for Level A harassment of North Atlantic right whales, specifically indicating that visually monitoring a 3.5- to 3.8-km would prove difficult and cited literature (Oedekoven and Thomas, 2022) estimating effectiveness of marine mammal observers (MMOs) to be 54 percent for detecting rorquals at 914 m or more, 31 percent for small cetaceans in pods of more than six, and 14 percent for small cetaceans in pods of six or fewer. The Commission did not provide any recommendations to increase visual detection capabilities.

Response: The time of year when Ocean Wind would be conducting the majority of pile driving is when North Atlantic right whale density in the project area is very low. As provided in Table 17 and 18, one North Atlantic right whale Level A harassment exposure was estimated (0.9 from WTG installation and 0.1 from OSS foundation installation). These estimates were derived without consideration of any mitigation (except 10-dB of sound attenuation) or natural avoidance of marine mammals to avoid loud sounds. Hence, even without any monitoring or mitigation (with exception of 10-dB of sound attenuation from the modeling), the potential for PTS to occur is low. As described in response to Comment 4, the Commission cites information from a paper related to the use of trained lookouts and a team of two on-duty MMOs on moving Navy military vessels

actively engaged in sonar training (Oedekoven and Thomas, 2022) to support its argument that visual monitoring would prove difficult. We note that these “trained lookouts” are Navy personnel who are specifically trained as lookouts in contrast to NMFS-approved PSOs who are required to have specific education backgrounds, trainings, and experience before undertaking PSO duties (see requirements found in the regulations text at Section 217.265(a)). NMFS disagrees that the statistics generated from that report are relevant to the effectiveness of monitoring for the Project. Independent, NMFS-approved PSOs are required during all impact pile driving (see requirements found in 217.265). At least three PSOs would be placed on the stationary pile driving platform and three PSOs would also be placed on each of two dedicated PSO vessels traveling at slow speeds (less than 10 kn) for a total of nine PSOs. Concurrently, real-time PAM is required to supplement visual monitoring during impact pile driving, UXO/MEC detonation, and select vessel transport. Further, Ocean Wind must monitor several times daily supplemental marine mammal detection information systems (e.g., the Right Whale Sighting Advisory System) to increase situational awareness. Hence, it is reasonable to assume that the effectiveness of marine mammal monitoring during the project is much greater than the two-person MMO team reported in Oedekoven and Thomas (2022). We note that the MMO team in Oedekoven and Thomas (2022), was not always using PAM in that study, and had significantly more *Balaenoptera spp.* sightings than the lookout team (see Table 2 in Oedekoven and Thomas (2022)). Given the monitoring measures that are required for the Project in combination with the mitigation measures (i.e., clearance and shutdown zones), NMFS disagrees that the monitoring measures will be insufficient to avoid Level A harassment (PTS) of North Atlantic right whales.

Comment 33: The Commission recommended that NMFS require Ocean Wind to have PAM operators also review acoustic data for at least 24 hours prior to UXO/MEC detonations, when available.

Response: We appreciate the Commission’s suggestion and have incorporated it into the final rule.

Comment 34: The Commission recommended that NMFS include a provision that the Lead PSO must have a minimum of 90 days of at-sea experience and must have had this experience within the last 18 months.

Response: We appreciate the Commission's suggestion and have incorporated it into the final rule.

Comment 35: A commenter stated that Ocean Wind should be required to use PSOs at all times when under way. They also suggested that PSOs complement their survey efforts using additional technologies, such as infrared detection devices when in low-light conditions.

Response: NMFS is not requiring PSOs to be onboard every transiting vessel. However, as described in the proposed rule, as well as the final rule, Ocean Wind must have trained observers onboard all vessels. This observer may be a PSO or a crew member with no other duties if the vessel is operating above 10 kn. NMFS is also requiring Ocean Wind to provide a North Atlantic Right Whale Vessel Strike Avoidance Plan to NMFS 90 days prior to the onset of vessel use. Ocean Wind submitted that plan on July 19, 2023. Once approved, this plan will be made available on NMFS' website at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>.

Comment 36: A commenter recommended that the LOA should require all vessels supporting site characterization to be equipped with and using Class A Automatic Identification System (AIS) devices at all times while on the water. A commenter suggested this requirement should apply to all vessels, regardless of size, associated with the survey.

Response: NMFS agrees that AIS should be required. This final rule includes a requirement that all vessels associated with the project be equipped with AIS.

Comment 37: A commenter stated that monitoring reports are not enough to evaluate impacts to marine mammals from offshore wind impacts and instead suggests that on-the-ground, independent scientists and response teams be located in the area during activities conducted under incidental take authorizations to monitor for impacts and to respond immediately or investigate if anything occurs. The commenter suggested that an organization charged specifically with responding to endangered marine mammal incidents (which NMFS notes, the commenter did not choose to define or specify further), be fully funded by the State and Federal agencies to collect the animal and conduct an independent and thorough/immediate investigation to determine the cause of death.

Response: NMFS disagrees with the commenter's recommendations. NMFS emphasizes that this final rule

authorizes incidental take by Level A and Level B harassment from auditory injury and behavioral disturbance. Moreover, no mortality or serious injury is anticipated or authorized in this final rule. During the specified activities identified for the Project, NMFS is requiring third-party, independent visual PSOs and PAM operators be present to provide monitoring support and to instigate mitigative actions, if they are needed, such as shutdowns or delays to activities. These specific personnel are also tasked to record instances of marine mammal observations (both visually or acoustically) while also providing additional information of the distance to approach (*i.e.*, how close was the sighting/detected marine mammal to the activity), the behavior of the animal(s), and any actions determined to be necessary to be undertaken, among other requirements. While the commenter suggests an independent team be funded to monitor and respond to events if they occur, it is unclear what action(s) the commenter recommends these individual undertake if a large whale is exposed to noise levels that would cause TTS or PTS nor were any suggestions made for NMFS to consider for this final rule. To the commenter's other suggestion, we note that the MMPA established the Marine Mammal Health and Stranding Response Program (MMHSRP), a national program that coordinates emergency responses to sick, injured, distressed, or dead marine mammals. In the event Ocean Wind discovers a stranded, entangled, injured, or dead marine mammal, it must report the observation to either the NMFS Greater Atlantic Stranding Hotline or the NMFS Southeast Stranding Hotline, depending on exact location, as soon as possible but within 24 hours. We reference the commenter to the Reporting section of the regulations (217.265(g)) for more information.

Comment 38: The Commission recommended that NMFS require Ocean Wind to submit a PAM plan and to allow for public comments to occur prior to the issuance of the final rule. The Commission specified that this plan should include the number, type(s) (*e.g.*, moored, towed, drifting, autonomous), deployment location(s), bandwidth/sampling rate, sensitivity of the hydrophones, estimated detection range(s) for ambient conditions and during pile driving, and the detection software to be used. They also recommended that Ocean Wind and other wind developers consider whether vector sensors should be used in

addition to deployed hydrophones to enhance detection capabilities, with a particular focus on "those vocalizations that may be drowned out by the hammer strikes and resulting reverberation."

Response: NMFS notes the Commission's recommendation for Ocean Wind to submit a PAM Plan to NMFS for approval is consistent with the proposed rule and this final rule. However, for the PAM Plan, this final rule requires the lead time for plan submission 180 days prior to the start of foundation installation activities. In order to meet the Commission's recommendation and the FAST-41 timeline, Ocean Wind would have had to submit a plan almost concurrently or shortly after the public comment period on the proposed rule which is not logistically feasible. Further, NMFS has identified the requirements that Ocean Wind must meet in its PAM plan in both the proposed rule, which was made available for public comment, and this final rule. Given NMFS' extensive expertise with passive acoustic monitoring and the fact that we are coordinating with BOEM's Center for Marine Acoustics (CMA), NMFS has determined that approval of the plan does not warrant public input. However, NMFS will share the plan with the Commission for review prior to approval of the plan. NMFS has included the Commission's recommendations, among other things, of what would be required in the PAM plan.

Comment 39: The Commission recommended that in the final rule NMFS: (1) specify which model-estimated zones (*i.e.*, acoustic ranges, exposure ranges, mitigation zones, monitoring zones) and which metrics (*i.e.*, flat maximum-over-depth (R_{max}), flat model-estimated acoustic ranges ($R_{95\%}$)) should be compared to the *in-situ* Level A and B harassment zones, (2) specify which type of *in-situ* Level A harassment zone (*i.e.*, acoustic or exposure ranges) should be calculated, and, (3) require that *in-situ* measurements be conducted for monopiles that are not represented by the previous three locations (*i.e.*, substrate composition, water depth) or by the hammer energies and numbers of strikes needed or number of piles installed in a given day.

Response: We have required, in the final rule, that the model-estimated acoustic ranges ($R_{95\%}$) be compared with the real-world sound field measurements as exposure ranges ($ER_{95\%}$) cannot be measured in the field. The acoustic ranges NMFS incorporated into the final rule are found in

Appendix H of Ocean Wind's ITA application and use the flat $R_{95\%}$ metric.

Regarding the Commission's second suggestions, the *in-situ* analysis for Level A harassment compared to acoustic range which will indicate if ERs modeled are acceptable, because if the acoustic range to the Level A harassment threshold is louder than acoustic range modeled by JASCO, one can assume the ER modeled is too small as animals move through a sound field.

Regarding the Commission's third suggestion, NMFS notes the proposed rule included language where if in the case that a monopile installation site or construction scenario was determined to be not representative of the rest of the monopile installation sites, Ocean Wind would be required to provide information on how additional sites and construction scenarios would be selected for SFV measurements, as would be described in their Foundation Installation Pile Driving SFV Plan. This plan would also be required to describe the methodology for collecting, analyzing, and preparing SFV measurement data for submission to NMFS. We acknowledge that this information is important and have carried over the same requirement into the final rule. However, we do not agree regarding the suggestion to require additional SFV based on variations in the hammer energies, number of strikes used for installation, or number of piles installed per day. NMFS applied the largest distances modeled, which represents maximum number of piles installed per day, maximum strikes predicted, and maximum hammer energies. Because of this, Ocean Wind is required to stay within the bounds of the analysis. We also note that any variation assuming less hammer strikes, less piles installed per day, or lower hammer energies would most likely result in less anticipated take per day, as the take authorized in the final rule is based on the highest bounds of the analysis. For all these reasons, we are not requiring additional SFV based on variations specific to the hammer energy, number of piles installed, or the total number of strikes.

Comment 40: The Commission recommended that NMFS require Ocean Wind to report on additional metrics not included in the proposed rule, including sound pressure level (SPL_{rms}) source levels, cumulative SEL, ranges to Level A harassment and Level B harassment thresholds, and types and locations of sound attenuation systems. The Commission also recommended the ranges to Level B harassment thresholds be based on the behavioral thresholds, not TTS thresholds. Lastly, the

Commission recommended that NMFS require that Ocean Wind deploys a minimum of three hydrophones for SFV during impact pile driving and a minimum of two hydrophones and one pressure transducer for SFV during UXO/MEC detonations.

Response: NMFS partially concurs with the Commission's recommendations. The interim report must now include peak, SPL, and SEL_{cum} metrics for all hydrophones, estimated distances to NMFS Level A harassment and Level B harassment thresholds, types and locations of sound attenuation systems. We also removed reference to the TTS thresholds. This information is also required in the final report. NMFS is not requiring source levels be estimated in interim reports given the quick turnaround time (48 hours) and amount of data needing to be analyzed in that time. The purpose of the interim reports are to determine that distances to Level A harassment and Level B harassment thresholds are not being exceeded and to determine if any mitigative action needs to be taken. Hence knowing source levels is not required at this stage. However, NMFS is requiring source levels (peak, SEL_{cum} , and SPL_{rms}) be included in the final SFV report. Regarding the hydrophones for SFV during pile driving, NMFS is requiring Ocean Wind place two hydrophones at four locations at an azimuth of least propagation loss and two at 750 m and 90 degrees from this azimuth. This results in a total of 10 hydrophones during SFV. Additionally, we have added a requirement to deploy a pressure transducer for UXO/MEC detonations, as suggested by the Commission.

Comment 41: Commenters stated that the LOA must include a requirement for all phases of the Ocean Wind 1 site characterization to subscribe to the highest level of transparency, including frequent reporting to Federal agencies, requirements to report all visual and acoustic detections of North Atlantic right whales and any dead, injured, or entangled marine mammals to NMFS or the U.S. Coast Guard as soon as possible and no later than the end of the PSO shift. A commenter states that to foster stakeholder relationships and allow public engagement and oversight of the permitting, the LOA should require all reports and data to be accessible on a publicly available website. A commenter also suggested that all quarterly reports of PSO sightings must be made publically available to continue to inform marine mammal science and protection.

Response: NMFS notes the commenters' recommendations to report

all visual and acoustic detections of North Atlantic right whales and any dead, injured, or entangled marine mammals to NMFS are consistent with the proposed rule and this final rule (see Situational Reporting). We refer the reader to 217.265(g)(13)(i)-(vi) of the regulations for more information on situational reporting.

Daily visual and acoustic detections of North Atlantic right whales and other large whale species along the Eastern Seaboard, as well as Slow Zone locations, are publicly available on WhaleMap (<https://whalemap.org/whalemap.html>). Further, recent acoustic detections of North Atlantic right whales and other large whale species are available to the public on NOAA's Passive Acoustic Cetacean Map website (<https://www.fisheries.noaa.gov/resource/data/passive-acoustic-cetacean-map>). Given the open access to the resources described above, NMFS does not concur that public access to quarterly PSO reports is warranted and we have not included this measure in the authorization. However, NMFS will post all final reports to our website. We reference the commenters to 217.265(g) for more information on reporting requirements in the regulations.

Comment 42: A commenter recommended that the use of quieter foundations be given full consideration when selecting a "preferred alternative" and that direct-drive turbines be used in lieu of gearboxes.

Response: The commenter refers to a "preferred alternative" suggests this comment is specific to the EIS BOEM developed for the project. NMFS agrees with the commenter that full consideration of various turbine foundations should be evaluated in an EIS but also recognizes that there are technological challenges and that the ultimate foundation type chosen must be practicable. Regardless, this rule evaluates the specified activities as described in Ocean Wind's MMPA application which includes installation of monopile and jacket foundations. With respect to direct-drive, NMFS agrees that the best available science indicates that these are known to be less noisy than gearboxes and we understand gearboxes are older technology. Ocean Wind has confirmed with NMFS that direct drive turbines will be used for the Ocean Wind project.

Effects Assessment

Comment 43: A commenter stated that there is a lack of basic research about the impacts of offshore wind energy development on large whales. They also asserted that the current application

does not adequately assess the impact to prey from construction and operation and suggest that any permits and authorizations (*i.e.*, any IHAs, regulations) for offshore wind development should not be issued until scientific baseline assessments for what harms may occur to whales are available. Prior to issuing any IHAs or regulations, the commenter recommended that an independent pilot project investigating the potential and real marine ecosystem impacts, including assessments for what harms may or could occur to whales, be conducted and sound science supported by planned or currently begun robust scientific baseline assessments and independent and peer-reviewed studies are complete.

Response: The MMPA requires NMFS to evaluate the effects of the specified activities in consideration of the best scientific evidence available and to issue the requested incidental take authorization if it makes the necessary findings. The MMPA does not allow NMFS to delay issuance of the requested authorization on the presumption that new information will become available in the future. If new information becomes available in the future, NMFS may modify the mitigation and monitoring measures in an LOA issued under these regulations through the adaptive management provisions. Furthermore, NMFS is required to withdraw or suspend an LOA if, after notice and public comment unless an emergency exists, it determines the authorized incidental take may be having more than a negligible impact on a species or stock.

NMFS has duly considered the best scientific evidence available in its effects analysis. The Potential Effects of Underwater Sound on Marine Mammals section of the proposed rule included a broad overview of the potential impacts on marine mammals from anthropogenic noise and provided summaries of several studies regarding the impacts of noise from several different types of sources (*e.g.*, airguns, Navy sonar, vessels) on large whales, including North Atlantic right whales. Offshore wind farm construction generates noise that is similar, or, in the case of vessel noise, identical, to noise sources included in these studies (*e.g.*, impact pile driving and airguns both produce impulsive, broadband sounds where the majority of energy is concentrated in low frequency ranges), and the breadth of the data from these studies helps us predict the impacts from wind activities. In addition, as described in the proposed rule, it is general scientific consensus that

behavioral responses to sound are highly variable and context-specific and are impacted by multiple factors including, but not limited to, behavioral state, proximity to the source, and the nature and novelty of the sound. Overall, the ecological assessments from offshore wind farm development in Europe and peer-reviewed literature on the impacts of noise on marine mammals both in the U.S. and worldwide provides the information necessary to conduct an adequate analysis of the impacts of offshore wind construction and operation on marine mammals in the Atlantic OCS. NMFS acknowledges that studies in Europe typically focus on smaller porpoise and pinniped species, as those are more prevalent in the North Sea and other areas where offshore wind farms have been constructed, and notes that the commenter did not provide additional scientific information for NMFS to consider.

With respect to adequately assessing impacts to prey from construction and operation, NMFS considered the information in Ocean Wind's application but greatly expanded on the analysis in the proposed rule. Hence, it is not relevant that Ocean Wind's application did not fully address potential impacts to prey, as NMFS conducted its own analysis for the proposed rule, which is incorporated by reference into this final rulemaking, based on the best scientific information available. Further, the Biological Opinion provides a robust analysis on the impacts on ESA-listed marine mammal prey, many of which (*e.g.*, fish, invertebrates) serve as prey for all marine mammals that we have summarized in this final rule. NMFS notes that the commenter did not provide additional scientific information on impacts on prey for NMFS to consider.

Furthermore, a commenter specifically points out a lack of baseline data available on harbor seals in the New Jersey area. NMFS points the commenter towards two sources of information for marine mammal baseline information: The Ocean/Wind Power Ecological Baseline Studies, January 2008–December 2009, completed by the New Jersey Department of Environmental Protection in July 2010 (<https://tethys.pnnl.gov/sites/default/files/publications/Ocean-Wind-Power-Baseline-Volume1.pdf>) and AMAPPS (<https://www.fisheries.noaa.gov/new-england-mid-atlantic/population-assessments/atlantic-marine-assessment-program-protected>) with annual reports available

from 2010 to 2020 that cover the areas across the Atlantic Ocean.

Comment 44: Some commenters questioned whether NMFS met its requirement to utilize the best available science in its analysis. A commenter stated that NMFS must use the more recent and best available science in evaluating impacts to North Atlantic right whales, including updated population estimates, recent habitat usage patterns for the project area, and a revised discussion of the acute and cumulative stress on whales in the region. A commenter identified that the North Atlantic right whale population abundance is less than that cited in the proposed rule. A commenter stated that NMFS did not use the best available science for the proposed rule (NMFS originally used $n = 368$) for the population estimate of North Atlantic right whales when NMFS' website stated that "there are fewer than 350 remaining" and that the North Atlantic right whale Consortium stated that 336 individuals remained in their 2021 Annual Report Card. A commenter also objected to NMFS' determination that no change was needed in the number of takes in the Applicant's request when NMFS acknowledged a revision in the density of the North Atlantic right whale population. A commenter then cited information about North Atlantic right whale population abundance to support this claim.

Response: The MMPA and its implementing regulations require that incidental take regulations be established based on the best available information, which does not always mean the most recent information. NMFS generally considers the information in the most recent U.S. Atlantic and Gulf of Mexico SAR (Hayes *et al.*, 2023) to be the best available information for a particular marine mammal stock because of the MMPA's rigorous SAR procedural requirements, which includes peer review by a statutorily established Scientific Review Group.

Regarding the comment related to the North Atlantic right whale population abundance that was cited in the proposed rule, since publication of the proposed rule, NMFS has finalized the 2022 Stock Assessment Report indicating the North Atlantic right whale population abundance is estimated as 338 individuals (N_{est} ; 95 percent confidence interval: 325–350; 88 FR 54592, August 11, 2023). NMFS has used this most recent best available scientific information in the analysis of this final rule. This new estimate, which is based off the analysis from Pace *et al.* (2017) and subsequent refinements

found in Pace (2021), is included by reference in the final 2022 SARs (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>) and provides the most recent and best available estimate, including improvements to NMFS' right whale abundance model. Specifically, Pace (2021) looked at a different way of characterizing annual estimates of age-specific survival. The results from the Pace (2021) paper that informed the final 2022 SARs strengthened the case for a change in mean survival rates after 2010 through 2011, but did not significantly change other current estimates (population size, number of new animals, adult female survival) derived from the model. Furthermore, NMFS notes that the SARs are peer reviewed by other scientific review groups prior to being finalized and published and that the North Atlantic Right Whale Report Card (Pettis *et al.*, 2022) does not undertake this process. Based on this, NMFS has considered all relevant information regarding North Atlantic right whale, including the information cited by the commenters. However, NMFS has relied on the final 2022 SAR in this final rule as it reflects the best available scientific information.

We note that this change in abundance estimate does not change the estimated take of North Atlantic right whales or authorized take numbers, nor affect our ability to make the required findings under the MMPA for Ocean Wind's construction activities.

Comment 45: Commenters raised concerns regarding the cumulative impacts of the multiple offshore wind projects being developed throughout the range of North Atlantic right (which they state as from North Carolina to Maine), and specifically recommended that we carefully consider the take from all of these projects in combination when conducting the negligible impact analysis for Ocean Wind. Relatedly, they emphasized the total take of bottlenose dolphins by Ocean Wind across multiple years, especially in combination with multiple projects. Commenters also objected to NMFS's conclusion that the application's take limit of 14 North Atlantic right whales for construction activities in the coastal waters between off New Jersey and New York will have a "negligible impact" on the species, especially in light of the North Atlantic right whale's critically endangered status, the ongoing Unusual Mortality Event that this species is experiencing and, consequently, the asserted existential threat posed to the species by obstacles to even one individual's survival—and they

emphasize this comment in combination with the need to consider the take from multiple projects.

Response: NMFS is required to authorize the requested incidental take if it finds the total incidental take of small numbers of marine mammals by U.S. citizens "*while engaging in that (specified) activity*" within a specified geographic region during the five-year period (or less) will have a negligible impact on such species or stock and where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses (16 U.S.C. 1371(a)(5)(A)). Negligible impact is defined as "*an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effect on annual rates of recruitment or survival*" (50 CFR 216.103). Neither the MMPA nor its implementing regulations require consideration of unrelated activities and their impacts on marine mammal populations in the negligible impact determination. Additionally, NMFS' implementing regulations require applicants to include in their request a detailed description of the specified activity or class of activities that can be expected to result in incidental taking of marine mammals (50 CFR 216.104(a)(1)). Thus, the "*specified activity*" for which incidental take coverage is being sought under section 101(a)(5)(A) is generally defined and described by the applicant. Here, Ocean Wind is the applicant, and we analyzed the impact of its specified activity described in its application and made the necessary determinations on that basis.

Consistent with the preamble of NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are factored into the baseline, which is used in the negligible impact analysis. Here, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.*, as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors).

The preamble of NMFS' implementing regulations also addresses cumulative effects from future, unrelated activities. Such effects are not considered in making negligible impact determination under section 101(a)(5) of the MMPA. Rather, NMFS considers: (1) cumulative effects that are reasonably foreseeable when preparing a National

Environmental Policy Act (NEPA) analysis, and (2) reasonably foreseeable cumulative effects under section 7 of the ESA for ESA-listed species, as appropriate. Accordingly, NMFS has adopted BOEM's Environmental Impact Statement (EIS) and reviewed by NMFS as part of its inter-agency coordination. This EIS addresses cumulative impacts related to the Project and substantially similar activities in similar locations. Cumulative impacts regarding the promulgation of the regulations and issuance of a LOA for construction activities, such as those planned by Ocean Wind, have been adequately addressed under NEPA in the adopted EIS that supports NMFS' determination that this action has been appropriately analyzed under NEPA. Separately, the cumulative effects of the Project on ESA-listed species, including the North Atlantic right whale, was analyzed under section 7 of the ESA when NMFS engaged in formal inter-agency consultation with the NOAA Greater Atlantic Regional Fisheries Office (GARFO). The Biological Opinion for the Project determined that NMFS' promulgation of the rulemaking and issuance of a LOA for construction activities associated with leasing, individually and cumulatively, are likely to adversely affect, but not jeopardize, listed marine mammals.

NMFS disagrees that the authorized take of 14 North Atlantic right whales by Level B harassment incidental to the Project will have a non-negligible impact on the species and notes that the commenter did not provide additional scientific information for NMFS to consider to support this claim. No take by injury, serious injury, or mortality is authorized. NMFS emphasizes that the authorized incidental take is limited to Level B harassment (*i.e.*, behavioral disturbance). As described in the proposed rule and this final rule (see Negligible Impact Analysis and Determination section), NMFS has determined that the Level B harassment of North Atlantic right will not result in impacts to the population through effects on annual rates or recruitment or survival. The project area occurs offshore of New Jersey, which does not include habitat where North Atlantic right whales are known to concentrate in foraging or reproductive behaviors. The project area is a known migratory corridor. Hence, it is likely that most of the authorized takes represent an exposure to a different individual, which means that the behavioral impacts to North Atlantic right whales are limited to behavioral disturbance occurring on 1 or 2 days within a year—

an amount that would not be expected to impact reproduction or survival. Across all years, while it is possible an animal migrating through could have been exposed during a previous year, the low amount of take authorized during the 5-year period ($n=14$) of the rule makes this scenario unlikely. Any disturbance to North Atlantic right whales due to Ocean Wind's activities is expected to result in temporary avoidance of the immediate area of construction but not abandonment of its migratory path. Slight displacement (but not abandonment) of a migratory pathway is unlikely to result in energetic consequences that could affect reproduction or survival of any individuals. Other impacts such as masking, TTS, and temporary communication and foraging disruption may occur (again noting that North Atlantic right whales concentrate foraging far north of the project area (e.g., southern New England, Gulf of Maine, and Canada)); however, these impacts would also be temporary and unlikely to lead to survival or reproduction impacts of any individual, especially when the extensive suite of mitigation, including numerous measures targeted specifically towards minimizing impacts to North Atlantic right whales, are considered.

Comment 46: Commenters asserted that: (1) NMFS' reliance on the 160-dB (1 micropascal squared seconds (re 1 $\mu\text{Pa}^2\text{s}$)) threshold for behavioral harassment is not supported by the best available scientific information and grossly underestimates takes by Level B harassment; and (2) the monitoring protocols prescribed for the clearance zones are under-protective.

Response: Regarding the appropriateness of the 160-dB behavioral harassment threshold, NMFS notes that the potential for behavioral response to an anthropogenic source is highly variable and context-specific and acknowledges the potential for Level B harassment at exposures to received levels below 160 dB rms. Alternatively, NMFS acknowledges the potential that not every animal exposed to received levels above 160 dB rms will respond in ways constituting behavioral harassment. There are a variety of studies indicating that contextual variables play a very important role in response to anthropogenic noise, and the severity of effects are not necessarily linear when compared to a received level (RL). Several studies (e.g., Nowacek *et al.*, 2004; Kastelein *et al.*, 2012 and 2015) showed there were behavioral responses to sources below the 160-dB threshold, but also acknowledged the importance of context

in these responses. For example, Nowacek *et al.* (2004) reported the behavior of five out of six North Atlantic right whales was disrupted at RLs of only 133–148 dB re 1 μPa (returning to normal behavior within minutes) when exposed to an alert signal. However, the authors also reported that none of the whales responded to noise from transiting vessels or playbacks of ship noise even though the RLs were at least as strong, and contained similar frequencies, to those of the alert signal. The authors state that a possible explanation for whales responding to the alert signal and not responding to vessel noise is due to the whales having been habituated to vessel noise, while the alert signal was a novel sound. In addition, the authors noted differences between the characteristics of the vessel noise and alert signal which may also have played a part in the differences in responses to the two noise types. Therefore, it was concluded that the signal itself, as opposed to the RL, was responsible for the response. DeRuiter *et al.* (2012) also indicate that variability of responses to acoustic stimuli depends not only on the species receiving the sound and the sound source, but also on the social, behavioral, or environmental contexts of exposure. Finally, Gong *et al.* (2014) highlighted that behavioral responses depend on many contextual factors, including range to source, RL above background noise, novelty of the signal, and differences in behavioral state. Similarly, Kastelein *et al.* (2015) examined behavioral responses of a harbor porpoise to sonar signals in a quiet pool, but stated behavioral responses of harbor porpoises at sea would vary with context such as social situation, sound propagation, and background noise levels.

NMFS uses 160 dB (rms) as the exposure level for estimating Level B harassment takes and is currently considered the best available science, while acknowledging that the 160-dB rms step-function approach is a simplistic approach. However, there appears to be a misconception regarding the concept of the 160-dB threshold. While it is correct that in practice it works as a step-function, *i.e.*, animals exposed to received levels above the threshold are considered to be “taken” and those exposed to levels below the threshold are not, it is in fact intended as a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes

that some animals exposed to levels below the threshold will in fact react in ways that appropriately considered take, while others that are exposed to levels above the threshold will not. Use of the 160-dB threshold allows for a simplistic quantitative estimate of take, while we can qualitatively address the variation in responses across different received levels in our discussion and analysis.

Overall, we reiterate the lack of scientific consensus regarding appropriate criteria. Defining sound levels that disrupt behavioral patterns is difficult because responses depend on the context in which the animal receives the sound, including an animal's behavioral mode when it hears sounds (e.g., feeding, resting, or migrating), prior experience, and biological factors (e.g., age and sex). Other contextual factors, such as signal characteristics, distance from the source, and signal to noise ratio, may also help determine response to a given received level of sound. Therefore, levels at which responses occur are not necessarily consistent and can be difficult to predict (Southall *et al.*, 2007; Ellison *et al.*, 2012; Southall *et al.*, 2021).

There is currently no concurrence on these complex issues, and NMFS followed its practice at the time of submission and review of this application in assessing the likelihood of disruption of behavioral patterns by using the 160-dB threshold. This threshold has remained in use in part because of the practical need to use a relatively simple threshold based on available information that is both predictable and measurable for most activities. We note that the seminal reviews presented by Southall *et al.* (2007), Gomez *et al.* (2016), and Southall *et al.* (2021) did not suggest any specific new criteria due to lack of convergence in the data. NMFS is currently evaluating available information towards development of updated guidance for assessing the effects of anthropogenic sound on marine mammal behavior. However, undertaking a process to derive defensible exposure-response relationships is complex. A recent systematic review by Gomez *et al.* (2016) was unable to derive criteria expressing these types of exposure-response relationships based on currently available data.

NMFS acknowledges that there may be methods of assessing likely behavioral responses to acoustic stimuli that better capture the variation and context-dependency of those responses than the simple 160 dB step-function used here; there is no agreement on what that method should be or how

more complicated methods may be implemented by applicants. NMFS is committed to continuing its work in developing updated guidance with regard to acoustic thresholds, but pending additional consideration and process is reliant upon an established threshold that is reasonably reflective of available science. We also note the commenters did not provide additional information for NMFS to consider to support their claim that the 160 dB behavioral harassment threshold is not the best available scientific information.

Regarding the assertion that monitoring protocols prescribed for the clearance and shutdown zones (called “exclusion zones” in the comment letter) are under-protective, please refer to Comments 12, 14, 15, 16, and 18.

Comment 47: In general, a commenter expressed concern that noise pollution from offshore wind activities would interfere with North Atlantic right whale’s social communication and prey detection. They are concerned with the low-frequency noise from large vessels involved in the construction activities overlapping North Atlantic right whale communication.

Response: As discussed in the Negligible Impact Analysis and Determination section (specifically the *Auditory Masking or Communication Impairment* sections) of both the proposed and final rule, the level of masking that could occur from Ocean Wind’s activities will have a negligible impact on marine mammals, including North Atlantic right whales. Inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the sound source are in close enough proximity for the effect to occur (and further this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency) and, as our analysis (both quantitative and qualitative components) indicates, because of the relative movement of whales and vessels, as well as the stationary nature of a majority of the activities, we do not expect these exposures with the potential for masking to be of a long duration within a given day. Further, because of the relatively low density of mysticetes during months where most of Ocean Wind’s activities would be occurring (May through November in most cases), and relatively large area over which the vessels will travel and where the activities will occur, we do not expect any individual North Atlantic right whales to be exposed to potentially masking levels from these surveys for more than a few days in a year. Furthermore, as many of the

activities are occurring in clusters and specific areas rather than sporadically dispersed in the project area (*i.e.*, foundation installation all occurs in the same general area, nearshore cable installation activities occur in relatively similar and nearby areas), animals are likely to temporarily avoid these locations during periods where activities are occurring but are expected to return once activities have ceased.

As noted above, any masking effects of Ocean Wind’s activities are expected to be limited in duration, if present. For HRG surveys, given the likelihood of significantly reduced received levels beyond short distances from the transiting survey vessel, the short duration of potential exposure, the lower likelihood of extensive additional contributors to background noise offshore and within these short exposure periods, and the fact that the frequency of HRG signals are primarily above those used in social communication or for detection of other important clues, we believe that the incremental addition of the survey vessel is unlikely to result in more than minor and short-term masking effects. Masking is not a concern for UXO/MEC detonations, given the instantaneous nature of the signal. For pile driving, and especially foundation installation, masking effects are more likely given the larger zones and longer durations, and animals that approach the source could experience temporary masking of some lower frequency cues. However, any such effects would be localized to the areas around these stationary activities, which means that whales transiting through the area could adjust their transit away from the construction location and return once the activity has completed. For the activity as a whole, any masking that might potentially occur would be expected to likely be incurred by the same animals predicted to be exposed above the behavioral harassment threshold, and thereby accounted for in the Level B harassment numbers. NMFS notes that the commenter did not provide additional scientific information for NMFS to consider to support its concern.

Comment 48: A commenter was concerned that limiting construction to occur during summer and fall months (due to the seasonal moratorium for foundation installation), construction activities would be concentrated into months where other marine mammal species (*i.e.*, dolphins and whales) are using the region for foraging, birthing, nursing, migrating, etc. A commenter recommended that NMFS fully account for the consequences of any other proposed North Atlantic right whale

seasonal restriction on other protected species and evaluate alternative risk reduction strategies that would protect multiple species.

Response: In order to promulgate a rulemaking under section 101(a)(5)(A) of the MMPA, NMFS must set forth, among other requirements, means of effecting the least practicable adverse impact on affected species or stocks and its habitat. In the proposed rule and in this final rule, NMFS has determined the mitigation measures will effect the least practicable adverse impact on all of the affected species or stocks and their habitat. NMFS acknowledges that the seasonal restriction for impact pile driving is to effect the least practicable adverse impact on North Atlantic right whales; however, NMFS notes that this seasonal restriction provides additional protections to many other large whale species that tend to concentrate off of New Jersey during winter months. For example, humpback whales are located in higher numbers nearshore in the project area from October through February, with a clear offshore shift starting in March (Roberts *et al.*, 2023). Harbor porpoises, as another example, are also likely to be more present when foundation installation and UXO/MEC detonation would not be occurring. As described in this final rule, there is no habitat of significance in the specified geographic region other than the seasonal migratory BIA for North Atlantic right whales.

Comment 49: A commenter stated that some of the specified activities will increase the number of vessels in the ocean in the project area, which will lead to an increased threat of harm by vessel strikes to marine mammals, specifically North Atlantic right whales.

Response: NMFS acknowledges that vessel strikes can result in injury or mortality of marine mammals. We analyzed the potential for vessel strike resulting from Ocean Wind’s activities and determined that based on the nature of the activity and the required mitigation measures specific to vessel strike avoidance included in this rulemaking, the potential for vessel strike is so low as to be discountable. The required mitigation measures, all of which were included in the proposed rulemaking and are now required in the final regulations, include: a requirement that all vessel operators comply with 10 kn (18.5 km/hour) or less speed restrictions in any SMA, DMA, or Slow Zone while underway, and check daily for information regarding the establishment of mandatory or voluntary vessel strike avoidance areas (SMAs, DMAs, Slow Zones) and information regarding North Atlantic

right whale sighting locations; a requirement that all vessels, regardless of size, operating from November 1 through April 30 operate at speeds of 10 kn (18.5 km/hour) or less; a requirement that all vessel operators reduce vessel speed to 10 kn (18.5 km/hour) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinid cetaceans are observed near the vessel; a requirement that all project vessels maintain a separation distance of 500 m or greater from North Atlantic right whales; a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 kn or less until the 500-m minimum separation distance has been established; a requirement that, if a North Atlantic right whale is sighted in a vessel's path, or within 500 m of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral; and, a requirement that all vessels underway must maintain a minimum separation distance of 100 m or 50 m from all other marine mammals (species-dependent and excluding North Atlantic right whales), with an understanding that at times this may not be possible (e.g., for animals that approach the vessel). Based on these, we have determined that the vessel strike avoidance measures in the rulemaking are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat.

Separately, NMFS notes that the commenter's comment appears to conflate vessel strike risks and impacts to marine mammals due to noise from construction vessels.

Comment 50: A commenter stated that the vessel strike avoidance measures in the proposed rule are insufficient and clearly are directed at vessels specifically engaging in the construction activities for the applicant. They stated that the application never accounted for vessel strikes from non-project-related vessels if North Atlantic right whales are displaced outside of the project area.

Response: Under the MMPA, NMFS must prescribe regulations setting forth other means of effecting the least practicable adverse impact of the requestor's specified activities on species or stocks and its habitat. NMFS cannot require non-project related vessels to implement mitigation through this rulemaking. NMFS acknowledges that North Atlantic right whales may temporarily avoid the area where the specified activities occur. However, NMFS does not anticipate that North Atlantic right whales will be permanently displaced or displaced for extended periods, and the commenter does not provide evidence that this

effect should be a reasonably anticipated outcome of the specified activity.

Furthermore, as described in the Biological Opinion issued by GARFO on April 3, 2023, NMFS does not expect that ESA-listed whales would experience a higher risk of vessel strike due to avoidance of pile driving. Any whale that would be exposed to vibratory pile driving noise from landfall activities (i.e., temporary cofferdams, temporary goal posts) would already be located in the part of the Wind Development Area with the heaviest amount of vessel traffic due to the nearshore coastal transit routes used by vessels that would move north and south along the coast and from vessels moving from port-to-port. Similarly, if pile-driving noise causes the whale to move further offshore, given the concentration of nearshore vessel activity, we expect that the whale would actually experience lower levels of vessel traffic. During impact pile driving we expect that any whales disturbed would only need to shift their position between 1.72–3.35 km to avoid pile-driving noise above the threshold for Level B harassment. This temporary avoidance/displacement would still mean that the whale is far from the heaviest vessel traffic routes, which are located approximately 10 nautical miles (nmi; 18.5 km) away from the Lease Area.

NMFS takes the risk of vessel strike seriously and has prescribed measures sufficient to avoid the potential for vessel strike to the extent practicable. NMFS has required these measures despite a very low likelihood of vessel strike; vessels associated with the construction activities will add a discountable amount of vessel traffic to the specific geographic region and furthermore, vessels towing survey gear travel at very slow speeds (e.g., roughly 4–5 kn (7.4–9.3 km/hour)) and any vessels engaged in construction activities would be primarily stationary during the pile-driving event.

Other

Comment 51: Commenters encouraged NMFS to issue LOAs on an annual basis, rather than a single 5-year LOA, to allow for the continuous incorporation of the best available scientific and commercial information and to modify mitigation and monitoring measures as necessary and in a timely manner. Commenters also stated that due to the precarious nature of the North Atlantic right whale, this annual approach is necessary to implement flexible protections.

Response: While NMFS understands the reasoning behind the commenters' suggestion, we do not think this is necessary as: (1) the final rule includes requirements for annual reports (in addition to weekly and monthly requirements) to support frequent evaluation of the activities and monitoring results; and (2) the final rule includes an Adaptive Management provision that allows NMFS to make modifications and adjustments to the measures found in the issued LOA if and when new information that supports necessary modifications becomes available. Because of this, NMFS will issue a single 5-year LOA and modify it, if and when necessary, at any point during the lifetime of the regulations.

Comment 52: The Commission recommended that NMFS rectify the following omissions and errors in the final rule: (1) Section 217.260(c)(2) should also specify "removal" of cofferdams; (2) Section 217.264(a)(4) omitted "UXO/MEC detonations" in the list of specified activities; (3) The duration that PSOs must monitor the area around each foundation pile (monopiles or pin piles) after pile driving has stopped should be specified as 30 minutes in section 217.264(d)(4) or (d)(5), as noted in the preamble to the proposed rule; (4) The terms "small odontocetes", "delphinids and harbor porpoises", and "dolphins and porpoises" were used interchangeably throughout the various mitigation measures in section 217.264; and (5) The terms "seals" and "pinnipeds" were used interchangeably or omitted altogether from the various mitigation measures in section 217.264.

Response: We appreciate the Commission's specific suggestions. We have rectified the first three concerns described in the Commission's list. We have not made adjustments with respect to the final two suggestions as the intermixed use of "seals" versus "pinnipeds" and "small odontocetes", "delphinids and harbor porpoises", and "dolphins and porpoises" are clearly describing the species at hand. Furthermore, this variation in language does not affect the clarity or understanding of the final rule or its provisions.

Comment 53: A commenter recommended that NMFS deny and rescind all ITAs for offshore wind construction, including this authorization to Ocean Wind, until the Draft North Atlantic Right Whale and Offshore Wind Strategy (Draft Strategy) is finalized. Referencing the low Potential Biological Removal (PBR) for North Atlantic right whales, the

commenter also stated that all industrial full-scale construction for offshore wind energy should be paused until the Federal agencies determine how best to eliminate or avoid all impacts, Level A harassment, and Level B harassment on the North Atlantic right whale.

Response: As identified by a commenter, in October 2022, NMFS and BOEM released a draft joint strategy to protect and promote the recovery of North Atlantic right whales while responsibly developing offshore wind energy. The draft strategy identifies three main goals: (1) mitigation and decision-support tools; (2) research and monitoring; and (3) collaboration, communication and outreach. It focuses on improving the body of science and integrating past, present and future efforts related to North Atlantic right whales and offshore wind development.

NMFS is required to authorize the requested incidental take if it finds the total incidental take of small numbers of marine mammals by U.S. citizens while engaging in a specified activity within a specified geographic region during a five-year period (or less) will have a negligible impact on such species or stock and where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses (16 U.S.C. 1371(a)(5)(A)). While the incidental take authorization must be based on the best scientific information available, the MMPA does not allow NMFS to delay issuance of the requested authorization on the presumption that new information will become available in the future. NMFS has made the required findings, based on the best scientific information available and has included mitigation measures to effect the least practicable adverse impacts on North Atlantic right whales. Many of these mitigation measures are found in the Draft Strategy, as appropriate, for construction activities. While NMFS continues to work together with BOEM towards the goals identified in the Strategy, finalizing the Strategy (or similar efforts) or completing specific goals identified in the strategy are not a prerequisite for the issuance of an ITA.

While NMFS agrees that the North Atlantic right whale population abundance is alarmingly low (with entanglement in fishing gear and vessel strikes being the leading causes of North Atlantic right whale mortality), NMFS disagrees that the type of harassment authorized in this rulemaking will have a non-negligible impact (*i.e.*, adversely affect the species through effects on annual rates of recruitment or survival). NMFS emphasizes that no mortality, serious injury, or Level A harassment is

anticipated or authorized for North Atlantic right whales from Ocean Wind's specified activities. Further, the impacts of Level B harassment (*i.e.*, behavioral disturbance) are expected to have a negligible impact on the North Atlantic right whale population. The magnitude of behavioral harassment authorized is very low and the severity of any behavioral responses is expected to be primarily limited to temporary displacement and avoidance of the area when some activities that have the potential to result in harassment are occurring (see the Negligible Impact Analysis and Determination section for our full analysis). No impacts to the reproductive success or survival of any individual North Atlantic right whales are expected to result from these disturbances and as such, no impacts to the population are expected to result. In its comment, the commenter conflates PBR level and Level B harassment and suggests that Level B harassment can have population level impacts. The PBR level is defined as the maximum number of animals, not including natural mortalities, that may be removed from a stock while allowing that stock to reach or maintain its optimum sustainable population (16 U.S.C. 1362(20)). Thus, PBR is only germane in the discussion of "removals" of individual North Atlantic right whales from the population and, therefore, PBR is not applicable in this discussion since no impact to reproduction or survival of any individuals is anticipated or authorized. Further, the commenter did not suggest mitigation measures to eliminate and avoid all impacts to North Atlantic right whales for NMFS to evaluate or consider.

NMFS notes that BOEM is the lead agency permitting the construction of offshore wind farms. NMFS' action authorizes take of marine mammals incidental to BOEM's permitted action (*i.e.*, offshore wind farm construction). Hence, the commenter's request is more relevant to BOEM's permitting authority. The commenter's comments regarding other offshore wind construction activities are outside the scope of this authorization.

Comment 54: A commenter questioned NMFS ability to consider an application wherein the applicant has not finalized design plans at the time of the proposed rule stage.

Response: NMFS acknowledges that at the time when the proposed rule was published in the **Federal Register**, Ocean Wind had not yet finalized its construction plan for the full buildout of permanent WTG and OSS foundations. Hence, NMFS conservatively carried forward the buildout scenario estimated

to have the greater number of takes into the total estimated take analysis and small numbers and negligible impact determination. There is no requirement in the MMPA that all project design plans must be finalized prior to NMFS evaluating an ITA request. NMFS further notes that these large-scale construction projects require flexibility throughout the permitting process as supply lines are established, contractors are hired, and communications with other Federal and state agencies occur. In its comment, the commenter implies that the applicant had not "disclosed the activity" in its entirety, which is not accurate. Ocean Wind presented an analysis for two potential buildout scenarios assuming either a full monopile foundation buildout or a dual monopile-jacket foundation buildout.

Comment 55: A commenter expressed concern for the accountability, fairness, and transparency regarding how and who will determine which vessel struck a North Atlantic right whale or any other marine mammal species, if it occurs.

Response: NMFS directs the commenter to language found in both the proposed and final rules regarding reporting in the event of a vessel strike by one of Ocean Wind's project vessels. This reporting requirement necessitates that the strike be reported to NMFS Office of Protected Resources and GARFO within and no later than 24 hours from the time of the strike occurred. In the event of a strike, all construction activities are required to cease until NMFS Office of Protected Resources is able to review the circumstances of the strike and determine if any additional measures are necessary to ensure LOA compliance. Ocean Wind must also provide a report including provisions such as, but not limited to: the time, date, and location of the strike; the species struck; the vessel speed at the time of the strike; the vessels course and heading; what operations the vessel was engaged in; information regarding what vessel strike reduction measures were in effect to avoid a strike; information on the behavior of the animal struck; the fate of the animal; as well as photographs and/or video, as practicable. Given the precarious nature of the North Atlantic right whale, as indicated in the commenter's comment, NMFS has also required a suite of vessel strike avoidance measures that are described both in other comments and within this final rule.

It is not clear what the commenter means by "fairness" in determining how or which vessel struck a North Atlantic right whale or other species if it occurs,

nor has the commenter provided specific suggestions for NMFS to evaluate as means by which to conduct the actions they suggest. Ocean Wind is the responsible party for activities specifically pertaining to their action (*i.e.*, the construction of the Project). Any strike would be unlawful. In the unforeseen circumstance that a vessel strike does occur, the relevant authorities (*i.e.*, NMFS, BOEM, the Bureau of Safety and Environmental Enforcement (BSEE)) will investigate and take appropriate action.

Changes From the Proposed to Final Rule

Since the publication of the proposed rule in the **Federal Register** (87 FR 64868, October 26, 2022), NMFS has made changes, where appropriate, that are reflected in the final regulatory text and preamble text of this final rule. These changes are briefly identified below, with more information included in the indicated sections of the preamble to this final rule.

Changes in Information Provided in the Preamble

The information found in the preamble of the Proposed Rule was based on the best available information at the time of publication. Since publication of the Proposed Rule, new information has become available, which has been incorporated into this final rule as discussed below.

The following changes are reflected in the Description of Marine Mammals in the Geographic Region section of the preamble to this final rule:

Given the release of NMFS' final 2022 SARs (Hayes *et al.*, 2023), we have updated the population estimate for the North Atlantic right whale (*Eubalaena glacialis*) from 368 to 338 and the total mortality/serious injury (M/SI) amount from 8.1 to 31.2. This increase is due to the inclusion of undetected annual M/SI in the total annual serious injury/mortality.

Given the availability of new information, we have made updates to the UME summaries for multiple species.

The following changes are reflected in the Estimated Take section of the preamble to this final rule:

We have increased the amount of take authorized for humpback whales, by Level A harassment, from 1 to 2 (based on a single group size from the Atlantic Marine Assessment Program for Protected Species (AMAPPS) dataset) and the amount of take authorized, by Level B harassment, from 4 to 46, based on a recommendation by the Marine Mammal Commission to consider a

previous Ocean Wind monitoring report (2021–2022) for activities offshore of New Jersey.

Based on a recommendation by the Marine Mammal Commission, NMFS has allocated takes by Level B harassment to the coastal stock of bottlenose dolphins ($n = 94$), which is 10 percent of the total takes for the offshore stock of bottlenose dolphins from foundation installation activities. This reduces the authorized take for the offshore stock to 90 percent of its original proposed value ($n = 842$).

Based on Ocean Wind replacing three cofferdams with goal posts, the take for several species (*i.e.*, fin whales (*Balaenoptera physalus*), minke whale (*Balaenoptera acutorostrata*), humpback whale (*Megaptera novaeangliae*), both stocks of bottlenose dolphins (*Tursiops truncatus*), common dolphins (*Delphinus delphis*), harbor porpoises (*Phocoena phocoena*), gray seals (*Halichoerus grypus*), and harbor seals (*Phoca vitulina*)) decreased slightly compared to what was originally proposed.

Based on a recommendation by the Marine Mammal Commission, we have increased the amount of take by Level B harassment of common dolphins and Atlantic white-sided dolphins (*Lagenorhynchus acutus*) from vibratory pile installation and removal associated with cable landfall construction from 10 to 30 and 5 to 12, respectively, based on a single group size each from the AMAPPS dataset.

Based on a recommendation by the Marine Mammal Commission, we have added additional take from UXO/MEC detonations, by Level A harassment, for minke whales ($n = 1$) and both stocks of bottlenose dolphins ($n = 11$ per stock), assuming a single group size each using information provided by Ocean Wind.

NMFS has corrected a mathematical error for sperm whales where the value presented in Table 33 was incorrectly labeled as six rather than nine during Year 2.

Changes in the Regulatory Text

We have made the following changes to the regulatory text, which are reflected, as appropriate, throughout this final rule and described, as appropriate, in the preamble.

For clarity and consistency, we revised two paragraphs in § 217.260 Specified activity and specified geographical region of the regulatory text to fully describe the specified activity and specified geographical region.

In § 217.261 Effective Dates, NMFS has changed the effective date from August 1, 2023 through July 31, 2028 to

October 13, 2023 through October 12, 2028. The associated **SUMMARY** and **DATES** sections of this final rule reflect this change.

The following change is reflected in § 217.262 Permissible Methods of Taking: adding vibratory pile driving of goal post to the list of permissible methods of taking by Level B harassment.

The following changes are reflected in the Description of the Specified Activities section of the preamble to this final rule:

Ocean Wind has modified their vibratory pile driving activities from vibratory pile driving seven temporary cofferdams to vibratory pile driving four temporary cofferdams (Barnegat Bay landfall locations) and three temporary goal posts (two at Island Beach State Park, one at BL England). The modification from goal posts to cofferdams at three nearshore locations neither changes the nature of the specified activity (*i.e.*, vibratory pile driving), nor the potential impacts to marine mammals associated with the specified activity. This modification reduces the total amount of vibratory driving time to complete all cable landfall construction work (by approximately 90 hours total (30 hours at each of three sites)).

The following changes are reflected in § 217.264 Mitigation Requirements and the associated Mitigation section of the preamble to this final rule:

Based on a recommendation by a commenter, NMFS has added a requirement that all project vessels must utilize AIS.

This final rule indicates that Ocean Wind is required to construct the project as expeditiously as possible to avoid foundation installation in December and that NMFS must approve foundation pile driving in December in consideration of the data available should Ocean Wind request to drive piles in December.

At the time of the proposed rule, NMFS had not approved nighttime pile driving as Ocean Wind had yet to prove the efficacy of their monitoring approaches during hours of darkness. However, given additional information provided by Ocean Wind, these final regulations allow Ocean Wind to initiate impact pile driving during hours of darkness only from June 1 to October 31, annually, in accordance with their Alternative Monitoring Plan (when approved, will be available on NMFS' website at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>).

NMFS has increased the size of the winter impact pile driving clearance zones for large whales (2,500 m to 3,000 m) and harbor porpoises (1,450 m to 1,750 m) and has removed the PAM clearance zone and PAM shutdown zone for North Atlantic right whales and added a single PAM monitoring zone (10 km) for all species (see Table 36) for clarity and to be consistent with the regulatory text in the proposed rule and in this final rule. Additionally, NMFS has clarified that the shutdown and clearance zones in Table 36 apply to both visual and auditory detections.

NMFS has added a requirement for a 10-m (32.8-ft) shutdown zone for all other in-water activities that are not expected to cause take of marine mammals (e.g., trenching, dredging), which may be monitored by any individual on watch (approved PSO not specifically required).

NMFS has included mitigation and monitoring zones specific to the different UXO/MEC charge weights, rather than a single zone size assuming only the largest charge weight, as Orsted has since provided evidence to NMFS that they can reliably identify UXO/MEC charge weights in the field.

The following changes are reflected in § 217.265 Monitoring and Reporting Requirements and the associated Monitoring and Reporting section of the preamble of this final rule:

We have updated the process for obtaining NMFS approval for PSO and PAM Operators to be similar to requirements typically included for seismic (e.g., airgun) surveys and have clarified education, training, and experience necessary to obtain NMFS' approval.

Based on a recommendation by the Marine Mammal Commission, we have added a requirement that the Lead PSO must have a minimum of 90 days of at-sea experience and must have obtained this experience within the last 18 months.

We have added a requirement to have at least three PSOs on pile driving vessels rather than two PSOs, as was originally described in the proposed rule.

Based on a recommendation by the Marine Mammal Commission, we have added a requirement that increases the time that PAM data must be reviewed prior to all UXO/MEC detonations from 1 to 24 hours (except in emergency cases where the 24-hour delay before the detonation occurred would create risk to human safety).

We have added a requirement for a double big bubble curtain placed at a

distance that would avoid damage to the nozzle holes during all UXO/MEC detonations.

Based on a recommendation by the Marine Mammal Commission, we have added a requirement that a pressure transducer must be used during all UXO/MEC detonations.

We have added a requirement stating that Ocean Wind must use at least one additional noise attenuation system (NAS) in addition to a single bubble curtain and other devices for noise attenuation.

We have added requirements that SFV must be conducted on every pile until measured noise levels are at or below the modeled noise levels, assuming 10 dB, for at least three consecutive monopiles and for each UXO/MEC detonation.

We have added a requirement that Ocean Wind must deploy at least eight hydrophones at four locations (one bottom and one mid-water column at each location) along an azimuth that is likely to see lowest propagation loss and two hydrophones (one bottom and one mid-water) at 750 m, 90 degrees from the primary azimuth during installation of all piles where SFV monitoring is required and equivalent requirements during all UXO/MEC detonations.

NMFS has changed the submission date from 90 to 180 days prior to the start of pile driving or UXO/MEC detonation commencement for the Pile Driving and UXO/MEC Marine Mammal Monitoring Plan and the PAM Plan (noting the Vessel Strike Avoidance and Vibratory Pile Driving Plans retain the 90-day requirement as these activities are very nearshore).

We have removed the requirements for reviewing data on an annual and biennial basis for adaptive management and instead will make adaptive management decisions as new information warrants it.

Description of Marine Mammals in the Specific Geographic Region

As noted in the Changes From the Proposed to Final Rule section, since the publication of the proposed rule (87 FR 64868, October 26, 2022), updates have been made to the abundance estimate for North Atlantic right whales and the UME summaries of multiple species. These changes are described in detail in the sections below. Otherwise, the Description of Marine Mammals in the Geographic Area section has not changed since the publication of the proposed rule in the **Federal Register** (87 FR 64868, October 26, 2022).

Several marine mammal species occur within the specific geographic region.

Sections 3 and 4 of Ocean Wind's ITA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species (Ocean Wind, 2022b). NMFS fully considered all of this information, and we refer the reader to these descriptions in the application, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' SARs (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS' website (<https://www.fisheries.noaa.gov/find-species>).

Table 2 lists all species or stocks for which take is authorized under this final rule and summarizes information related to the species or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs; (16 U.S.C. 1362(20))). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 2 are the most recent available data at the time of publication which can be found in NMFS' 2022 final SARs (Hayes *et al.*, 2023), available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>.

TABLE 2—MARINE MAMMAL SPECIES^e THAT MAY OCCUR IN THE PROJECT AREA AND BE TAKEN, BY HARASSMENT

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ^a	Stock abundance (CV, Nmin, most recent abundance survey) ^b	PBR	Annual M/SI ^c
Order Artiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
<i>Family Balaenidae:</i> North Atlantic right whale ...	<i>Eubalaena glacialis</i>	Western Atlantic	E, D, Y	338 (0; 332; 2020) ^f	0.7	'31.2
<i>Family Balaenopteridae</i> (rorquals):						
Blue whale	<i>Balaenoptera musculus</i>	Western North Atlantic	E, D, Y	UNK (UNK; 402; 1980– 2008).	0.8	0
Fin whale	<i>Balaenoptera physalus</i>	Western North Atlantic	E, D, Y	6,802 (0.24; 5,573; 2016)	11	1.8
Humpback whale	<i>Megaptera novaeangliae</i>	Gulf of Maine	-, -, N	1,396 (0; 1,380; 2016) ...	22	12.15
Minke whale	<i>Balaenoptera acutorostrata</i>	Canadian Eastern Coastal	-, -, N	21,968 (0.31; 17,002; 2016).	170	10.6
Sei whale	<i>Balaenoptera borealis</i>	Nova Scotia	E, D, Y	6,292 (1.02; 3,098; 2016)	6.2	0.8
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
<i>Family Physeteridae:</i> Sperm whale	<i>Physeter macrocephalus</i>	North Atlantic	E, D, Y	4,349 (0.28; 3,451; 2016)	3.9	0
<i>Family Delphinidae:</i> Atlantic spotted dolphin	<i>Stenella frontalis</i>	Western North Atlantic	-, -, N	39,921 (0.27; 32,032; 2016).	320	0
Atlantic white-sided dolphin	<i>Lagenorhynchus acutus</i>	Western North Atlantic	-, -, N	93,233 (0.71; 54,433; 2016).	544	27
Bottlenose dolphin	<i>Tursiops truncatus</i>	Western North Atlantic—Off- shore.	-, -, N	62,851 (0.23; 51,914; 2016).	519	28
Common dolphin	<i>Delphinus delphis</i>	Northern Migratory Coastal	-, -, Y	6,639 (0.41; 4,759; 2016)	48	12.2–21.5
Long-finned pilot whale	<i>Globicephala melas</i>	Western North Atlantic	-, -, N	172,974 (0.21; 145,216; 2016).	1,452	390
Short-finned pilot whale	<i>Globicephala macrorhynchus</i> ...	Western North Atlantic	-, -, N	39,215 (0.30; 30,627; 2016).	306	9
Risso's dolphin	<i>Grampus griseus</i>	Western North Atlantic	-, -, N	28,924 (0.24, 23,637, 2016).	236	136
<i>Family Phocoenidae (por- poises):</i> Harbor porpoise	<i>Phocoena phocoena</i>	Western North Atlantic	-, -, N	35,215 (0.19; 30,051; 2016).	301	34
		Gulf of Maine/Bay of Fundy	-, -, N	95,543 (0.31; 74,034; 2016).	851	164
Order Carnivora—Superfamily Pinnipedia						
<i>Family Phocidae (earless seals):</i> Gray seal ^d	<i>Halichoerus grypus</i>	Western North Atlantic	-, -, N	27,300 (0.22; 22,785; 2016).	1,458	4,453
Harbor seal	<i>Phoca vitulina</i>	Western North Atlantic	-, -, N	61,336 (0.08; 57,637; 2018).	1,729	339

^aESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

^bNMFS' marine mammal stock assessment reports can be found online at: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments. CV is the coefficient of variation; Nmin is the minimum estimate of stock abundance.

^cThese values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, vessel strike).

^dNMFS' stock abundance estimate (and associated PBR value) applies to the U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,431. The annual M/SI value given is for the total stock.

^eInformation on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (<https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/>; Committee on Taxonomy (2023)).

^fIn the proposed rule (87 FR 64868, October 26, 2022), a population estimate of 368 was used which represented the best available science at the time of publication. However, since the publication of the proposed rule, a new estimate (n=338) was released in NMFS' draft and final 2022 SARs and has been incorporated into this final rule. In addition, the total annual average observed North Atlantic right whale mortality was updated in the final SARs from 8.1 to 31.2. Total annual average observed North Atlantic right whale mortality during the period 2016 through 2020 was 8.1 animals and annual average observed fishery mortality was 5.7 animals. Numbers presented in this table (31.2 total mortality and 22 fishery mortality) are 2015 through 2019 estimated annual means, accounting for undetected mortality and serious injury. (Hayes et al., 2023).

All 38 species that could potentially occur in the Project Area are included in Table 3–1 of the Ocean Wind's ITA application and discussed therein (Ocean Wind, 2022b). While the majority of these species have been documented or sighted off the New Jersey coast in the past, for the species and stocks not listed in Table 2, NMFS considers it unlikely that their

occurrence would overlap the activity in a manner that would result in harassment, either because of their spatial occurrence (i.e., more northern or southern ranges) and/or with the geomorphological characteristics of the underwater environment (i.e., water depth in the development area).

A detailed description of the species likely to be affected by the Project,

including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the proposed rule (87 FR 64868, October 26, 2022). Since that time, a new SAR (Hayes et al., 2023) has become available for the North Atlantic right whale. Estimated abundance for

the species declined from 368 to 338 and annual M/SI increased from 8.1 to 31.2. This large increase in annual serious injury/mortality is a result of NMFS including undetected annual M/SI in the total annual serious injury/mortality. The North Atlantic right whale population remains in decline, as described in the *North Atlantic Right Whale* species section below. We are not aware of any additional changes in the status of the species and stocks listed in Table 2; therefore, detailed descriptions are not provided here. Please refer to the proposed rule for these descriptions (87 FR 64868, October 26, 2022). Please also refer to NMFS' website (<https://www.fisheries.noaa.gov/find-species>) for generalized species accounts.

Since the publication of the proposed rule, the following updates have occurred to the below species in regards to general information or their active UMEs.

North Atlantic Right Whale

In August 2023, NMFS released its final 2022 SARs, which updated the population estimate (N_{best}) of North Atlantic right whales from 368 to 338 individuals and the annual M/SI value from 8.1 to 31.2 due to the addition of estimated undetected mortality and serious injury, as described above, which had not been previously included in the SAR. The population estimate is slightly lower than the North Atlantic Right Whale Consortium's 2022 Report Card, which identifies the population estimate as 340 individuals (Pettis *et al.*, 2023). Elevated North Atlantic right whale mortalities have occurred since June 7, 2017, along the U.S. and Canadian coast, with the leading category for the cause of death for this UME determined to be "human interaction," specifically from entanglements or vessel strikes. Since publication of the proposed rule, the number of animals considered part of the UME has increased. As of August 16, 2023, there have been 36 confirmed mortalities (dead, stranded, or floaters), 0 pending mortalities, and 34 seriously injured free-swimming whales for a total of 70 whales. As of October 14, 2022, the UME also considers animals ($n=45$) with sub-lethal injury or illness (called "morbidity") bringing the total number of whales in the UME to 115. More information about the North Atlantic right whale UME is available online at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event>.

Humpback Whale

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine to Florida. This event was declared a UME in April 2017. Partial or full necropsy examinations have been conducted on approximately half of the 204 known cases (as of August 16, 2023). Of the whales examined (approximately 90), about 40 percent had evidence of human interaction, either vessel strike or entanglement (refer to <https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2023-humpback-whale-unusual-mortality-event-along-atlantic-coast>). While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. NOAA is consulting with researchers that are conducting studies on the humpback whale populations, and these efforts may provide information on changes in whale distribution and habitat use that could provide additional insight into how these vessel interactions occurred. More information is available at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2023-humpback-whale-unusual-mortality-event-along-atlantic-coast>.

Since December 1, 2022, the number of humpback strandings along the mid-Atlantic coast, including New Jersey, has been elevated. In some cases, the cause of death is not yet known. In others, vessel strike has been deemed the cause of death. As the humpback whale population has grown, they are seen more often in the Mid-Atlantic. These whales may be following their prey (small fish) which are reportedly close to shore in the winter. These prey also attract fish that are of interest to recreational and commercial fishermen. This increases the number of boats and fishing gear in these areas. More whales in the water in areas traveled by boats of all sizes increases the risk of vessel strikes. Vessel strikes and entanglement in fishing gear are the greatest human threats to large whales.

Minke Whale

Since January 2017, a UME has been declared based on elevated minke whale mortalities detected along the Atlantic coast from Maine through South Carolina. As of August 16, 2023, a total of 156 minke whales have stranded during this UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings have shown evidence of human interactions or

infectious disease in several of the whales, but these findings are not consistent across all of the whales examined, so more research is needed. This UME has been declared non-active and is pending closure. More information is available at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-minke-whale-unusual-mortality-event-along-atlantic-coast>.

Phocid Seals

Since June 2022, elevated numbers of harbor seal and gray seal mortalities have occurred across the southern and central coast of Maine. This event was declared a UME in July 2022. Preliminary testing of samples has found some harbor and gray seals are positive for highly pathogenic avian influenza. While the UME is not occurring in the Project Area, the populations affected by the UME are the same as those potentially affected by the Project. However, due to the two states being approximately 352 km (219 mi) apart, by water (from the most northern point of New Jersey to the most southern point of Maine), NMFS does not expect that this UME would be further conflated by the activities related to the Project. Information on this UME is available online at: <https://www.fisheries.noaa.gov/2022-2023-pinniped-unusual-mortality-event-along-maine-coast>.

The above event was preceded by a different UME, occurring from 2018–2020 (closure of the 2018–2020 UME is pending). Beginning in July 2018, elevated numbers of harbor seal and gray seal mortalities occurred across Maine, New Hampshire, and Massachusetts. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated numbers, therefore the UME investigation encompassed all seal strandings from Maine to Virginia. A total of 3,152 reported strandings (of all species) occurred from July 1, 2018, through March 13, 2020. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME. Information on this UME is available online at: <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along>.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.*, Richardson *et al.*, 1995; Wartzok and

Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018)

described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 dB threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS
[NMFS, 2018]

Hearing group	Generalized hearing range*
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, Kogia, river dolphins, <i>cephalorhynchid</i> , <i>Lagenorhynchus cruciger</i> & <i>L. australis</i>).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.*, 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013). For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. NMFS notes that in 2019a, Southall *et al.* recommended new names for hearing groups that are widely recognized. However, this new hearing group classification does not change the weighting functions or acoustic thresholds (*i.e.*, the weighting functions and thresholds in Southall *et al.* (2019a) are identical to NMFS 2018 Revised Technical Guidance). When NMFS updates our Technical Guidance, we will be adopting the updated Southall *et al.* (2019a) hearing group classification.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the Project's specified activities have the potential to result in the harassment of marine mammals in the specified geographic region. The proposed rule (87 FR 64868, October 26, 2022) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of

underwater noise from Ocean Wind's project activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final rule determination and is not repeated here; please refer to the notice of the proposed rule (87 FR 64868, October 26, 2022).

Estimated Take

As noted in the Changes From the Proposed to Final Rule section, minor changes to the estimated and authorized take for several species have been made, based on recommendations received during the public comment period and based on a mathematical error NMFS found for a single species. These changes are described in detail in the sections below and, otherwise, the methodology for, and amount of, estimated take has not changed since the proposed rule.

This section provides an estimate of the number of incidental takes authorized through this rulemaking, which will inform both NMFS' consideration of "small numbers" and the negligible impact determination.

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.*, impact and vibratory pile driving, site characterization surveys, and UXO/MEC detonations) have the potential to result in disruption of marine mammal behavioral patterns due to exposure to elevated noise levels. Impacts such as masking and TTS can contribute to

behavioral disturbances. There is also some potential for auditory injury (Level A harassment) to occur in select marine mammal species incidental to the specified activities (*i.e.*, impact pile driving, vibratory pile driving, and UXO/MEC detonations). For this action, this potential is limited to mysticetes, high-frequency cetaceans, and phocids due to their hearing sensitivities and the nature of the activities. As described below, the larger distances to the PTS thresholds, when considering marine mammal weighting functions, demonstrate this potential. For mid-frequency hearing sensitivities, when thresholds and weighting and the associated PTS zone sizes are considered, the potential for PTS from the noise produced by the project is negligible. The required mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or authorized for this project. Below we describe how the take was estimated.

Generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine

mammals within these ensounded areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (e.g., previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the authorized take estimates.

Marine Mammal Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment). Thresholds have also been developed to identify the levels above which animals may incur different types of tissue damage (non-acoustic Level A harassment or mortality) from exposure to pressure waves from explosive detonation. Thresholds have also been developed identifying the received level of in-air sound above which exposed pinnipeds would likely be behaviorally harassed. A summary of all NMFS' thresholds can be found at (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>).

Level B harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other

factors related to the source or exposure context (e.g., frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (e.g., other noises in the area) and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (e.g., Southall *et al.*, 2007, 2021; Ellison *et al.*, 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μ Pa)) for continuous (e.g., vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μ Pa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources (Table 4). Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to

detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

Ocean Wind's construction activities include the use of continuous (e.g., vibratory pile driving), intermittent (e.g., impact pile driving, HRG acoustic sources) and, therefore, the 120 and 160 dB re 1 μ Pa (rms) thresholds are applicable. NMFS notes there are separate explosive thresholds to account for Level B harassment from a single detonation per day and those are included in Table 5 below.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.*, metric resulting in the largest isopleth). Ocean Wind's project includes the use of impulsive and non-impulsive sources.

These thresholds are provided in Table 4 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.

TABLE 4—ONSET OF PERMANENT THRESHOLD SHIFT (PTS)
[NMFS, 2018]

Hearing group	PTS onset thresholds* (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	Cell 1: $L_{p,0-pk,flat}$: 219 dB; $L_{E,p,LF,24h}$: 183 dB	Cell 2: $L_{E,p,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	Cell 3: $L_{p,0-pk,flat}$: 230 dB; $L_{E,p,MF,24h}$: 185 dB	Cell 4: $L_{E,p,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	Cell 5: $L_{p,0-pk,flat}$: 202 dB; $L_{E,p,HF,24h}$: 155 dB	Cell 4: $L_{E,p,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	Cell 7: $L_{p,0-pk,flat}$: 218 dB; $L_{E,p,PW,24h}$: 185 dB	Cell 8: $L_{E,p,PW,24h}$: 201 dB.

* Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0-pk}$) has a reference value of 1 μ Pa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1 μ Pa²s. In this Table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO, 2017). The subscript "flat" is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.*, 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Explosive sources—Based on the best available science, NMFS uses the

acoustic and pressure thresholds indicated in Tables 5 and 6 to predict

the onset of behavioral harassment, TTS, PTS, tissue damage, and mortality

from explosive detonations. Given Ocean Wind would be limited to detonating one UXO/MEC per day, the TTS threshold is used to estimate the

potential for Level B (behavioral) harassment (*i.e.*, individuals exposed above the TTS threshold may also be harassed by behavioral disruption but

we do not anticipate any impacts from exposure to UXO/MEC detonation below the TTS threshold would constitute behavioral harassment).

TABLE 5—PTS ONSET, TTS ONSET, FOR UNDERWATER EXPLOSIVES
[NMFS, 2018]

Hearing group	PTS impulsive thresholds	TTS impulsive thresholds
Low-Frequency (LF) Cetaceans	Cell 1: $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	Cell 2: $L_{pk,flat}$: 213 dB; $L_{E,LF,24h}$: 168 dB.
Mid-Frequency (MF) Cetaceans	Cell 4: $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	Cell 5: $L_{pk,flat}$: 224 dB; $L_{E,MF,24h}$: 170 dB.
High-Frequency (HF) Cetaceans	Cell 7: $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	Cell 8: $L_{pk,flat}$: 196 dB; $L_{E,HF,24h}$: 140 dB.
Phocid Pinnipeds (PW) (Underwater)	Cell 10: $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	Cell 11: $L_{pk,flat}$: 212 dB; $L_{E,PW,24h}$: 170 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS/TTS onset.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μ Pa, and cumulative sound exposure level (L_E) has a reference value of 1 μ Pa²s. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI, 2013). However, ANSI defines peak sound pressure as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the overall marine mammal generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Additional thresholds for the onset of non-auditory injury to lung and gastrointestinal organs from the blast shock wave and/or high peak pressures are also relevant (at relatively close

ranges) (Table 6). These criteria have been developed by the U.S. Department of the Navy (DoN, 2017a) and are based on the mass of the animal (*e.g.*, lowest to highest range for each hearing group)

and the depth at which it is present in the water column. Equations predicting the onset of the associated potential effects are included below (Table 6).

TABLE 6—LUNG AND GASTROINTESTINAL (G.I.) TRACT INJURY THRESHOLDS
[DoN, 2017]

Hearing group	Mortality (severe lung injury) *	Slight lung injury *	G.I. tract injury
All Marine Mammals	Cell 1: Modified Goertner model; Equation 1.	Cell 2: Modified Goertner model; Equation 2.	Cell 3: $L_{pk,flat}$: 237 dB.

* Lung injury (severe and slight) thresholds are dependent on animal mass (Recommendation: Table C.9 from DoN (2017) based on adult and/or calf/pup mass by species).

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μ Pa. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI, 2013). However, ANSI defines peak sound pressure as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the overall marine mammal generalized hearing range.

Modified Goertner Equations for severe and slight lung injury (pascal-second):

Equation 1: $103M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s

Equation 2: $47.5M^{1/3}(1 + D/10.1)^{1/6}$ Pa-s

M animal (adult and/or calf/pup) mass (kilogram (kg)) (Table C.9 in DoN, 2017).

D animal depth (meters).

Below, we discuss the acoustic modeling, marine mammal density information, and take estimation for each of Ocean Wind’s construction activities. NMFS has carefully considered all information and analysis presented by Ocean Wind as well as all other applicable information and, based on the best available science, concurs that Ocean Wind’s estimates of the types and amounts of take for each species and stock are complete and accurate.

Marine Mammal Densities

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

Habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory

and the Marine-life Data and Analysis Team, based on the best available marine mammal data from 1992–2022 obtained in a collaboration between Duke University, the Northeast Regional Planning Body, the University of North Carolina Wilmington, the Virginia Aquarium and Marine Science Center, and NOAA (Roberts *et al.*, 2016a, 2016b, 2017, 2018, 2020, 2021a, 2021b, 2023), represent the best available information regarding marine mammal densities in the survey area. More recently, these data have been updated with new modeling results and include density estimates for pinnipeds (Roberts *et al.*, 2016b, 2017, 2018, 2023). Density data are subdivided into five separate raster data layers for each species, including: Abundance (density), 95 percent

Confidence Interval of Abundance, 5 percent Confidence Interval of Abundance, Standard Error of Abundance, and Coefficient of Variation of Abundance.

Ocean Wind’s initial densities and take estimates were included in the ITA application that was considered Adequate & Complete on February 11, 2022, in line with NMFS’ standard ITA guidance (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/apply-incident-take-authorization>). However, on June 20, 2022, the Duke Marine Geospatial Ecology Laboratory released a new, and more comprehensive, set of marine mammal density models for the area along the East Coast of the United States (Roberts

et al., 2023). The differences between the new density data and the older data necessitated the use of updated marine mammal densities and, subsequently, revised marine mammal take estimates. This information was provided to NMFS as a memo (referred to as the Revised Density and Take Estimate Memo) on August 29, 2022 after continued discussion between Ocean Wind and NMFS and NMFS has considered it in this analysis. The Revised Density and Take Estimate Memo was made public on NMFS' website (<https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>) on October 26, 2022.

The densities used to estimate take from WTG and OSS foundation installation, were calculated based on average monthly densities for all grid cells within the Lease Area as well as grid cells extending an additional 5-km (3.11 miles (mi)) beyond the Lease Area, referred to as a 5 km perimeter (refer to Figure 1 of the Revised Density and Take Estimate Memo provided by Orsted). The take estimates assumed that up to 60 WTG monopiles would be installed in the highest density month for each marine mammal species (2 monopiles per day maximum × 30 days) with the remaining 38 WTG monopiles being installed in the second highest density month (2 monopiles per day maximum × 19 days). This estimation approach is conservative as it is unlikely that all piles will be installed within 2 months; however, given the uncertainty with the exact pile schedule, this approach analyzes and provides certainty that the maximum of take has been analyzed. Given the small number of jacket piles needed for OSS compared to the number of monopile WTGs, these were assumed to be installed in the highest density month only.

For cofferdam and goal post density estimates, a 10-km (6.21-mi) perimeter was applied around each of the cofferdam and goal post locations (Figure 2 of the Revised Density and Take Estimate Memo), with densities averaged among the seven cofferdam and goal post locations to result in one

density table for all cofferdams and goal posts. Due to the uncertainty of the specific months that temporary cofferdam and goal post would be installed and removed via vibratory pile driving, Ocean Wind used the average density for the months of October through May, as described in the Revised Density and Take Estimate Memo. We note that in the application Ocean Wind assumed all the work would occur in the month when a species density was the highest (e.g., Ocean Wind has assumed all cofferdams and goal posts would occur in December for humpback whales but in April for sei whales; Table 6–2 in the ITA application). This original approach was deemed too conservative and the revised approach, as described in the aforementioned Memo, avoids the unnecessary overestimation of marine mammal takes. While it is possible for the seven installation and removal events to occur within the same month, there is no specific expectation that the installations will occur immediately one after another across the different locations and, therefore, this approach is appropriate.

To estimate densities for the HRG surveys occurring both within the Lease Area and within the export cable routes, a 5-km (3.11-mi) perimeter was applied around the cable corridors (Figure 3 of the Revised Density and Take Estimate Memo). Given this work could occur year-round, the average annual density for each species was calculated using average monthly densities from January through December. The revised density estimates for HRG surveys were calculated for both the export cable route area and the Lease Area in the Revised Density and Take Estimate Memo in a way that aligned with the proposed schedule for HRG activities (88 survey days in Years 1, 4, and 4; 180 survey days in Years 2 and 3), as opposed to averaging the each species annual density across the entire Project Area was presented in the ITA application. Furthermore, while the original ITA application included the entire HRG area (Lease Area and export cable routes) collectively, the Memo has separated these two locations with more specific densities for the export cable

route and Lease Area. These changes better account for the activity footprint and perimeter (5 km) to more accurately represent the spatial extent and resolution of the survey effort planned.

Given that UXOs/MECs have the potential to occur anywhere within the Project Area, a 15-km (9.32-mi) perimeter was applied to both the Lease Area and the export cable corridors (Figure 4 of the Revised Density and Take Estimate Memo). In cases where monthly densities were unavailable, annual densities were used instead (*i.e.*, blue whales, pilot whale *spp.*, Atlantic spotted dolphins).

NMFS notes several exceptions to the determination of the relevant densities for some marine mammal species to the method described above. These are described here in greater detail.

For several marine mammal species, Roberts *et al.* (2023) does not differentiate by stock. This is true for the bottlenose dolphins, for which take has been authorized for two stocks (coastal migratory and offshore stock). This is also true for long-finned and short-finned pilot whales (pilot whales *spp.*) and harbor and gray seals (seals), where a pooled density is the only value available from the data that is not partitioned by stock. To account for this, the coastal migratory and offshore stocks of bottlenose dolphins were adjusted based on the 20-m isobath cutoff, such that take predicted to occur in any area less than 20 m in depth was apportioned to the coastal stock only and take predicted to occur in waters of greater than 20 m of depth was apportioned to the offshore stock. The densities for the pilot whales were apportioned based on their relative abundance in the Project Area to estimate species- and stock-specific exposures. The same approach was taken for the two pinniped species (harbor and gray seals), where each species was scaled based on its relative abundance in the Project Area, as opposed the application of the same density to both, as previously described in the ITA application. Tables 7, 8, 9, and 10 below demonstrate all of the densities used in the exposure and take analyses.

TABLE 7—THE HIGHEST AND SECOND HIGHEST MONTHLY MARINE MAMMAL AND ANNUAL DENSITIES (ANIMALS PER Km²) USED FOR THE MODELING OF OCEAN WIND'S WTGS AND OSSS FROM MAY THROUGH DECEMBER

Marine mammal species	Monopile foundations		Jacket foundations
	First highest density	Second highest density	First highest density
North Atlantic right whale ^a	0.00045 (December)	0.00012 (November)	0.00045 (December).
Blue whale ^a	(^c)	(^c)	(^c).
Fin whale ^a	0.00141 (December)	0.00080 (May)	0.00141 (December).

TABLE 7—THE HIGHEST AND SECOND HIGHEST MONTHLY MARINE MAMMAL AND ANNUAL DENSITIES (ANIMALS PER Km²) USED FOR THE MODELING OF OCEAN WIND'S WTGS AND OSSS FROM MAY THROUGH DECEMBER—Continued

Marine mammal species	Monopile foundations		Jacket foundations
	First highest density	Second highest density	First highest density
Humpback whale	0.00126 (December)	0.00085 (May)	0.00126 (December).
Minke whale	0.00674 (May)	0.00154 (June)	0.00674 (May).
Sei whale ^a	0.00042 (December)	0.00021 (November)	0.00042 (December).
Sperm whale ^a	0.00008 (May)	0.00004 (December)	0.00008 (May).
Atlantic spotted dolphin	(^c)	(^c)	(^c).
Atlantic white-sided dolphin	0.00643 (May)	0.00539 (November)	0.00643 (May).
Bottlenose dolphin (offshore stock) ^b	0.11352 (August)	0.11146 (November)	0.11352 (August).
Bottlenose dolphin (coastal stock) ^b	0.51100 (September)	0.47620 (August)	0.51100 (September).
Common dolphin	0.05157 (December)	0.04682 (November)	0.05157 (December).
Long-finned pilot whale ^b	0.00015 (annual)	n/a	0.00015 (annual).
Short-finned pilot whale ^b	0.00011 (annual)	n/a	0.00011 (annual).
Risso's dolphin	0.00096 (December)	0.00063 (November)	0.00096 (December).
Harbor porpoise	0.02456 (December)	0.00801 (May)	0.02456 (December).
Gray seal	0.03517 (December)	0.03017 (May)	0.03517 (December).
Harbor seal	0.09830 (December)	0.08433 (May)	0.09830 (December).

^a Listed as Endangered under the Endangered Species Act.^b Densities were adjusted by their relative abundance.^c Exposure modeling for the blue whale and Atlantic spotted dolphin was not conducted because impacts to those species approach zero due to their low predicted densities in the Project; therefore, they were excluded from all quantitative analyses and tables based on modeling results.TABLE 8—THE MARINE MAMMAL AVERAGE AND ANNUAL DENSITIES (ANIMALS PER Km²) USED FOR ANALYSIS OF OCEAN WIND'S COFFERDAM AND GOAL POST INSTALLATION AND REMOVAL FOR OCTOBER THROUGH MAY

Marine mammal species	Period of density used	Estimated density
North Atlantic right whale ^a	October–May average	0.00028
Blue whale ^a	Annual Density	0.00075
Fin whale ^a	October–May average	0.00039
Humpback whale	October–May average	0.00062
Minke whale	October–May average	0.00078
Sei whale ^a	October–May average	0.00014
Sperm whale ^a	October–May average	0.00002
Atlantic spotted dolphin	(^c)	(^c)
Atlantic white-sided dolphin	October–May average	0.00077
Bottlenose dolphin (offshore stock) ^b	October–May average	0.14866
Bottlenose dolphin (coastal stock) ^b	October–May average	0.32471
Common dolphin	October–May average	0.00409
Long-finned pilot whale ^b	Annual Density	0.00001
Short-finned pilot whale ^b	Annual Density	0.00001
Risso's dolphin	October–May average	0.00002
Harbor porpoise	October–May average	0.00854
Gray seal	October–May average	0.03602
Harbor seal	October–May average	0.10069

^a Listed as Endangered under the Endangered Species Act.^b Densities were adjusted by their relative abundance (short-finned pilot whale = 0.00000133395 animals/km²; long-finned pilot whale = 0.00000181 animals/km²).^c No exposure modeling was performed for this species and it was added later after analysis had concluded.TABLE 9—THE HIGHEST MONTHLY MARINE MAMMAL AND ANNUAL DENSITIES (ANIMALS PER Km²) USED FOR THE MODELING OF OCEAN WIND'S UXOS/MECS FOR MAY THROUGH OCTOBER

Marine mammal species	Density used
North Atlantic right whale ^a	0.00008 (May).
Blue whale ^a	0.00001 (Annual)
Fin whale ^a	0.00068 (May).
Humpback whale	0.00081 (May).
Minke whale	0.00627 (May).
Sei whale ^a	0.00021 (May).
Sperm whale ^a	0.00008 (May).
Atlantic spotted dolphin	(^c)
Atlantic white-sided dolphin	0.00545 (May).
Bottlenose dolphin (offshore stock) ^b	0.12615 (August).
Bottlenose dolphin (coastal stock) ^b	0.71100 (September).
Common dolphin	0.02407 (May).
Long-finned pilot whale ^b	0.00013 (Annual).

TABLE 9—THE HIGHEST MONTHLY MARINE MAMMAL AND ANNUAL DENSITIES (ANIMALS PER Km²) USED FOR THE MODELING OF OCEAN WIND'S UXOs/MECs FOR MAY THROUGH OCTOBER—Continued

Marine mammal species	Density used
Short-finned pilot whale ^b	0.00010 (Annual).
Risso's dolphin	0.00021 (May).
Harbor porpoise	0.00789 (May).
Gray seal	0.03387 (May).
Harbor seal	0.09467 (May).

^a Listed as Endangered under the Endangered Species Act.^b Densities were adjusted by their relative abundance.^c No exposure modeling was performed for this species and it was added later after analysis had concluded.TABLE 10—THE HIGHEST MONTHLY MARINE MAMMAL, AVERAGE, AND ANNUAL DENSITIES IN (ANIMALS PER Km²) USED FOR ANALYSIS OF OCEAN WIND'S HRG SURVEY EFFORT FOR THE EXPORT CABLE ROUTE AND INTER-ARRAY CABLES FROM JANUARY THROUGH DECEMBER

Marine mammal species	Wind farm area	Export cable route
North Atlantic right whale ^a	0.00026 (Average Annual)	0.00026 (Average Annual).
Blue whale ^a	0.00001 (Annual)	0.00001 (Annual).
Fin whale ^a	0.00086 (Average Annual)	0.00054 (Average Annual).
Humpback whale	0.00069 (Average Annual)	0.00057 (Average Annual).
Minke whale	0.00171 (Average Annual)	0.00099 (Average Annual).
Sei whale ^a	0.00022 (Average Annual)	0.00016 (Average Annual).
Sperm whale ^a	0.00003 (Average Annual)	0.00002 (Average Annual).
Atlantic spotted dolphin	(^c)	(^c).
Atlantic white-sided dolphin	0.00399 (Average Annual)	0.00130 (Average Annual).
Bottlenose dolphin (offshore stock) ^b	0.06119 (Average Annual)	0.14499 (Average Annual).
Bottlenose dolphin (coastal stock) ^b	0.18073 (Average Annual)	0.36680 (Average Annual).
Common dolphin	0.02418 (Average Annual)	0.00702 (Average Annual).
Long-finned pilot whale ^b	0.00018 (Annual)	0.00002 (Annual).
Short-finned pilot whale ^b	0.00014 (Annual)	0.00001 (Annual).
Risso's dolphin	0.00029 (Average Annual)	0.00005 (Average Annual).
Harbor porpoise	0.01518 (Average Annual)	0.00925 (Average Annual).
Gray seal	0.01687 (Average Annual)	0.02165 (Average Annual).
Harbor seal	0.04715 (Average Annual)	0.06051 (Average Annual).

^a Listed as Endangered under the Endangered Species Act.^b Densities were adjusted by their relative abundance.^c No exposure modeling was performed for this species and it was added later after analysis had concluded.

Modeling and Take Estimation

Below, we describe the three methods that were used to estimate take in consideration of the acoustic thresholds and marine mammal densities described above and the four different activities (WTG and OSS foundation installation, temporary cofferdam and goal post installation/removal, UXO/MEC detonation, and HRG surveys). The take estimates for the four different activities, as well as the combined total, are presented.

WTG and OSS Foundation Installation

As described above, Ocean Wind plans to install up to 98 WTGs and 3 OSS in the Lease Area. The proposed rule modeled and estimated take of marine mammals for two OSS construction scenarios (*i.e.*, monopile foundation and jacket foundation with pin piles) and carried the jacket foundation scenario forward into the total estimated take from all activities as it resulted in the higher estimated take number between the two scenarios. Because Ocean Wind's Construction and Operation Plan (COP) allows for the construction of either scenario, the final

rule's estimated take analysis conservatively assumes the jacket foundation scenario will occur. For clarity, we have limited the estimated take analysis in this final rule to the jacket foundation scenario. For the analysis of the monopile foundation scenario, please refer to the Estimated Take section of the proposed rule.

Representative hammering schedules of increasing hammer energy with increasing penetration depth were modeled, resulting in, generally, higher intensity sound fields as the hammer energy and penetration increases (Table 11).

TABLE 11—ESTIMATED IMPACT HAMMER ENERGY SCHEDULES FOR MONOPILES AND PIN PILES

Monopile foundations (8/11-m)			Jacket foundations (Pin piles; 2.44-m)		
Hammer: IHC S-4000			Hammer: IHC S-2500		
Energy level (kJ) ¹	Strike count	Pile penetration depth (m)	Energy level (kJ)	Strike count	Pile penetration depth
500	763	7	500	554	3

TABLE 11—ESTIMATED IMPACT HAMMER ENERGY SCHEDULES FOR MONOPILES AND PIN PILES—Continued

Monopile foundations (8/11-m)			Jacket foundations (Pin piles; 2.44-m)		
Hammer: IHC S-4000			Hammer: IHC S-2500		
Energy level (kJ) ¹	Strike count	Pile penetration depth (m)	Energy level (kJ)	Strike count	Pile penetration depth
2,000	980	6	200	5,373	29
1,000	375	3	750	1,402	8
3,000	385	2	1,000	1,604	8
4,000	5,006	16	1,500	1,310	6
3,000	1,135	6	2,500	1,026	6
4,000	2,202	10	1,500	1,922	10
Total	10,846	50	Total	13,191	70

¹ Sediment types with greater resistances require hammers that deliver higher energy strikes and/or an increased number of strikes relative to installation in softer sediments. Typically the maximum sound levels usually occur during the last stage of impact pile installation where the greatest resistance is encountered (Betke, 2008).

Both monopiles and pin piles were assumed to be vertically aligned and driven to a maximum depth of 50 m for all monopiles and 70 m for all pin piles. While pile penetration depths may vary slightly, these values were chosen as reasonable penetration depths during modeling. All acoustic modeling was performed assuming that concurrent pile driving of either monopiles or pin piles would not occur. While multiple piles may be driven within any single 24-hour period, these installation activities would not occur simultaneously. Below we describe the assumptions inherent to the modeling approach and those by which Ocean Wind 1 would not exceed:

Modeling assumptions for the project are as follows:

- Up to two monopiles installed per day (4 hours per monopile; 9 hours of total with 8 hours of active pile driving time), although only one monopile may be installed on some days;
- No concurrent monopile and/or pin pile driving would occur;
- Monopiles would be 80 millimeters (mm) thick and consist of steel;
- Impact pile driving: IHC S-4000 or IHC S-2500 kJ rated energy; 1,977.151 kilonewton (kN) ram weight);
- Helmet weight: 3,776.9 kN;
- Impact hammers would have a maximum power capacity of 6,000 kilowatts (kW);
- Up to three pin piles could be installed per day;
- Pin piles would be 75 mm thick;
- Impact Pile driving: IHC S-2,500 kJ rated energy; 1,227.32 kN ram weight); and
- Helmet weight: 279 kN.

Sound fields produced during impact pile driving were modeled by first characterizing the sound signal produced during pile driving using the

industry standard GRL Wave Equation Analysis Program (GRLWEAP; wave equation analysis of pile driving) model and JASCO's Pile Driving Source Model (PDSM). We provide a summary of the modelling effort below but the full JASCO modeling report can be found in Section 6 and Appendix A of Ocean Wind's ITA application (<https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>).

Underwater sound propagation (*i.e.*, transmission loss) as a function of range from each source was modeled using JASCO's Marine Operations Noise Model (MONM) for multiple propagation radials centered at the source to yield three-dimensional (3D) transmission loss fields in the surrounding area. The MONM computes received per-pulse SEL for directional sources at specified depths. MONM uses two separate models to estimate transmission loss.

At frequencies less than 2 kHz, MONM computes acoustic propagation via a wide-angle parabolic equation (PE) solution to the acoustic wave equation based on a version of the U.S. Naval Research Laboratory's Range-dependent Acoustic Model (RAM) modified to account for an elastic seabed. MONM-RAM incorporates bathymetry, underwater sound speed as a function of depth, and a geo-acoustic profile based on seafloor composition, and accounts for source horizontal directivity. The PE method has been extensively benchmarked and is widely employed in the underwater acoustics community, and MONM-RAM's predictions have been validated against experimental data in several underwater acoustic measurement programs conducted by JASCO. At frequencies greater than 2

kHz, MONM accounts for increased sound attenuation due to volume absorption at higher frequencies with the widely used BELLHOP Gaussian beam ray-trace propagation model. This component incorporates bathymetry and underwater sound speed as a function of depth with a simplified representation of the sea bottom, as sub-bottom layers have a negligible influence on the propagation of acoustic waves with frequencies above 1 kHz. MONM-BELLHOP accounts for horizontal directivity of the source and vertical variation of the source beam pattern. Both propagation models account for full exposure from a direct acoustic wave, as well as exposure from acoustic wave reflections and refractions (*i.e.*, multi-path arrivals at the receiver).

The sound field radiating from the pile was simulated using a vertical array of point sources. Because sound itself is an oscillation (vibration) of water particles, acoustic modeling of sound in the water column is inherently an evaluation of vibration. For this study, synthetic pressure waveforms were computed using the full-wave range-dependent acoustic model (FWRAM), which is JASCO's acoustic propagation model capable of producing time-domain waveforms.

Models are more efficient at estimating SEL than SPL_{rms}. Therefore, conversions may be necessary to derive the corresponding SPL_{rms}. Propagation was modeled for a subset of sites using the FWRAM, from which broadband SEL to SPL conversion factors were calculated. The FWRAM required intensive calculation for each site, thus a representative subset of modeling sites were used to develop azimuth-, range-, and depth-dependent conversion factors. These conversion factors were

used to calculate the broadband SPL_{rms} from the broadband SEL prediction.

The sound fields for the monopile and pin pile scenarios were each modeled based on one representative location in the Lease Area. For monopiles this area is G10 and for jacket foundations with pin piles this area is Z11 (see in Appendix A of the ITA application). Both modeling locations were selected as they were determined to be the most representative of the water depths in the Lease Area, as appropriate for each foundation type (*i.e.*, monopiles in shallower waters and jackets in deeper waters). All monopiles were assumed to be driven vertically and to a maximum penetration depth of 50 m (164 ft). All pin piles associated with jacket foundations were also assumed to be driven vertically to a maximum penetration depth of 70 m (230 ft).

The model also incorporated two different sound velocity profiles (related to *in-situ* measurements of temperature, salinity, and pressure within the water column) to account for variations in the acoustic propagation conditions between summer (May through November) and winter (December only). The estimated pile driving schedules (Table 16) were used to calculate the SEL sound fields at different points in time during impact pile driving.

Next, Ocean Wind modeled the sound field produced during impact pile driving by incorporating the results of the source level modeling into an acoustic propagation model. The sound propagation model incorporated site-specific environmental data that considers bathymetry, sound speed in the water column, and seabed geo-acoustics in the construction area.

Ocean Wind estimated both acoustic ranges and exposure ranges. Acoustic ranges represent the distance to a harassment threshold based on sound propagation through the environment (*i.e.*, independent of any receiver) while exposure range represents the distance at which an animal can accumulate enough energy to exceed a Level A harassment threshold in consideration of how it moves through the environment (*i.e.*, using movement modeling). In both cases, the sound level estimates are calculated from 3D sound fields and then, at each horizontal sampling range, the maximum received level that occurs within the water column is used as the

received level at that range. These maximum-over-depth (R_{max}) values are then compared to predetermined threshold levels to determine acoustic and exposure ranges to Level A harassment and Level B harassment zone isopleths. However, the ranges to a threshold typically differ among radii from a source, and also might not be continuous along a radii because sound levels may drop below threshold at some ranges and then exceed threshold at farther ranges. To minimize the influence of these inconsistencies, 5 percent of the farthest such footprints were excluded from the model data. The resulting range, $R_{95\%}$, was chosen to identify the area over which marine mammals may be exposed above a given threshold, because, regardless of the shape of the maximum-over-depth footprint, the predicted range encompasses at least 95 percent of the horizontal area that would be exposed to sound at or above the specified threshold. The difference between R_{max} and $R_{95\%}$ depends on the source directivity and the heterogeneity of the acoustic environment. $R_{95\%}$ excludes ends of protruding areas or small isolated acoustic foci not representative of the nominal ensonified zone. For purposes of calculating Level A harassment take, Ocean Wind applied $R_{95\%}$ exposure ranges, not acoustic ranges, to estimate take and determine mitigation distances for the reasons described below.

In order to best evaluate the SEL_{cum} harassment thresholds for PTS, it is necessary to consider animal movement, as the results are based on how sound moves through the environment between the source and the receiver. Applying animal movement and behavior within the modeled noise fields provides the exposure range, which allows for a more realistic indication of the distances at which PTS acoustic thresholds are reached that considers the accumulation of sound over different durations (note that in all cases the distance to the peak threshold is less than the SEL-based threshold).

As described in Section 2.6 of Appendix A of Ocean Wind's ITA application, for modeled animals that have received enough acoustic energy to exceed a given Level A harassment threshold, the exposure range for each animal is defined as the closest point of approach (CPA) to the source made by

that animal while it moved throughout the modeled sound field, accumulating received acoustic energy. The resulting exposure range for each species is the 95th percentile of the CPA distances for all animals that exceeded threshold levels for that species (termed the 95 percent exposure range ($ER_{95\%}$)). The $ER_{95\%}$ ranges are species-specific rather than categorized only by any functional hearing group, which allows for the incorporation of more species-specific biological parameters (*e.g.*, dive durations, swim speeds, *etc.*) for assessing the impact ranges into the model. Furthermore, because these $ER_{95\%}$ ranges are species-specific, they can be used to develop mitigation monitoring or shutdown zones.

Tables 12 and 13 below represent the $ER_{95\%}$ exposure ranges (for SEL_{cum} and SPL_{rms}) for monopiles foundations, with Table 12 demonstrating the ranges using the summer sound speed profile and Table 13 using the winter sound speed profile. For both tables, a single monopiles and two monopiles per day are provided (the two per day ranges are shown in the parenthesis). NMFS notes that monopiles foundations constructed for Ocean Wind 1 are applicable to all WTGs and may be applicable to OSS structures, depending on the finalized buildout. Please see the Estimated Take section below, Appendix A of the Ocean Wind 1 ITA application, and Appendix R of the Ocean Wind 1 COP for further details on the acoustic modeling methodology.

Displayed in Tables 12, 13, 14, and 15 below, Ocean Wind would also employ a noise abatement system during all impact pile driving of monopiles. Noise abatement systems, such as bubble curtains, are sometimes used to decrease the sound levels radiated from a source. Additional information on sound attenuation devices is discussed in the Noise Abatement Systems section under the Mitigation section. In modeling the sound fields for Ocean Wind's proposed activities, hypothetical broadband attenuation levels of 0 dB, 6 dB, 10 dB, 15 dB, and 20 dB were modeled to gauge the effects on the ranges to thresholds given these levels of attenuation. The results for 10 dB of sound attenuation are shown below and the other attenuation levels (0 dB, 6 dB, 15 dB, and 20 dB) can be found in the ITA application.

TABLE 12—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT THRESHOLDS (SEL_{cum}) AND EXPOSURE RANGES ($ER_{95\%}$) AND ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL B HARASSMENT THRESHOLD (SPL_{rms}) FOR MONOPILE FOUNDATIONS IN THE SUMMER (MAY–NOVEMBER), ASSUMING 10-dB ATTENUATION; EXPOSURE RANGES ARE FOR ONE (AND TWO) MONOPILES PER DAY

Marine mammal species	Exposure ranges ($ER_{95\%}$)		Acoustic range ($R_{95\%}$)
	Level A harassment (km)	Level B harassment (km)	Level B harassment (km)
North Atlantic right whale	1.28 (1.37)	2.95 (2.98)	a 3.253
Blue whale * .....	.....	.....
Fin whale	1.58 (1.65)	3.04 (3.13)	
Humpback whale	1.14 (1.05)	3.10 (3.09)	
Minke whale	1.23 (1.26)	3.13 (3.10)	
Sei whale	1.36 (1.27)	3.13 (3.09)	
Sperm whale	0 (0)	0 (0)	
Atlantic spotted dolphin * .....	.....	.....
Atlantic white-sided dolphin	0 (0)	3.10 (3.04)	
Common dolphin	0 (0)	3.09 (3.05)	
Bottlenose dolphin (coastal stock)	0 (0)	2.80 (2.81)	
Bottlenose dolphin (offshore stock)	0 (0)	2.90 (2.81)	
Long-finned pilot whale	0 (0)	0 (0)	
Short-finned pilot whale	0 (0)	3.01 (3.08)	
Risso's dolphin	0 (0)	3.06 (3.09)	
Harbor porpoise	0.84 (0.88)	3.11 (3.07)	
Gray seal	0 (0.08)	3.21 (3.09)	
Harbor seal	0 (0.06)	3.11 (3.08)	

* Exposure modeling for the blue whale and Atlantic spotted dolphin was not conducted because impacts on the species approach zero due to their low predicted densities in the Project Area. These species were excluded from quantitative analyses and tables. Results for these scenarios can be found in Appendix A in the ITA application.

^a The acoustic range can be found in Table H–25 in Appendix H of Ocean Wind's ITA application. The value shown here is for 170 dB as Appendix H did not account for 10 dB of sound attenuation.

TABLE 13—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT THRESHOLDS (SEL_{cum}) AND EXPOSURE RANGES ($ER_{95\%}$) AND ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL B HARASSMENT THRESHOLD (SPL_{rms}) FOR MONOPILE FOUNDATIONS IN THE WINTER (DECEMBER), ASSUMING 10-dB ATTENUATION; EXPOSURE RANGES ARE FOR ONE (AND TWO) MONOPILES PER DAY

Marine mammal species	Exposure ranges ($ER_{95\%}$)		Acoustic range ($R_{95\%}$)
	Level A harassment (km)	Level B harassment (km)	Level B harassment (km)
North Atlantic right whale (migrating)	1.85 (2.03)	3.28 (3.35)	a 3.534
Blue whale * .....	.....	.....
Fin whale	2.33 (2.49)	3.48 (3.44)	
Humpback whale (migrating)	1.75 (1.77)	3.32 (3.37)	
Minke whale (migrating)	1.98 (1.98)	3.39 (3.42)	
Sei whale (migrating)	1.86 (2.19)	3.42 (3.45)	
Sperm whale	0 (0)	0 (0)	
Atlantic spotted dolphin * .....	.....	.....
Atlantic white-sided dolphin	0 (0)	3.37 (3.33)	
Bottlenose dolphin (coastal stock)	0 (0)	3.12 (3.15)	
Bottlenose dolphin (offshore stock)	0 (0)	3.22 (3.18)	
Common dolphin	0 (0)	3.40 (3.36)	
Long-finned pilot whale	0 (0)	0 (0)	
Short-finned pilot whale	0 (0)	3.31 (3.41)	
Risso's dolphin	0 (0)	3.49 (3.36)	
Harbor porpoise	1.06 (1.43)	3.34 (3.37)	
Gray seal	0 (0.14)	3.44 (3.42)	
Harbor seal	0.07 (0.24)	3.47 (3.31)	

* Exposure modeling for the blue whale and Atlantic spotted dolphin was not conducted because impacts on the species approach zero due to their low predicted densities in the Project Area. These species were excluded from quantitative analyses and tables. Results for these scenarios can be found in Appendix A in the ITA application.

^a The acoustic range can be found in Table H–26 in Appendix H of Ocean Wind's ITA application. The value shown here is for 170 dB as Appendix H did not account for 10 dB of sound attenuation.

Tables 14 and 15 below represent the exposure ranges ($ER_{95\%}$) for jacket foundations, with Table 14 demonstrating the ranges using the summer sound speed profile and Table 15 using the winter sound speed profile.

For both tables, two pin piles and three pin piles (the three pin pile ranges are shown in the parenthesis) per day are provided. As with Tables 12 and 13 above, sound reductions of 0, 6, 10, 15, and 20 dB were modeled, but Ocean

Wind would only be required to meet a minimum sound reduction level of 10 dB. The results for 10 dB of sound attenuation are shown below and the other attenuation levels (0, 6, 15, and 20 dB) can be found in the ITA application.

TABLE 14—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT THRESHOLDS (SEL_{cum}) AND EXPOSURE RANGES ($ER_{95\%}$) AND ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL B HARASSMENT THRESHOLD (SPL_{rms}) FOR JACKET FOUNDATIONS (PIN PILES) IN THE SUMMER (MAY–NOVEMBER), ASSUMING 10–dB ATTENUATION; EXPOSURE RANGES ARE FOR TWO (AND THREE) PIN PILES PER DAY

Marine mammal species	Exposure ranges ($ER_{95\%}$)		Acoustic range ($R_{95\%}$)
	Level A harassment (km)	Level B harassment (km)	Level B harassment (km)
North Atlantic right whale	0.51 (0.58)	1.64 (1.72)	a 2.155
Blue whale * .....	.....	.....
Fin whale	0.55 (0.59)	1.82 (1.79)	
Humpback whale	0.40 (0.42)	1.81 (1.86)	
Minke whale	0.55 (0.51)	1.76 (1.76)	
Sei whale	0.37 (0.36)	1.81 (1.84)	
Sperm whale	0 (0)	0 (0)	
Atlantic spotted dolphin * .....	.....	.....
Atlantic white-sided dolphin	0 (0)	1.55 (1.72)	
Bottlenose dolphin (offshore stock)	0 (0)	1.58 (1.60)	
Bottlenose dolphin (coastal stock)	0 (0)	1.53 (1.46)	
Common dolphin	0 (0)	1.72 (1.72)	
Long-finned pilot whale	0 (0)	0 (0)	
Short-finned pilot whale	0 (0)	0 (0)	
Risso's dolphin	0 (0)	1.61 (1.65)	
Harbor porpoise	0.61 (0.61)	1.75 (1.73)	
Gray seal	0 (<0.01)	1.75 (1.65)	
Harbor seal	0 (<0.01)	1.96 (1.91)	

* Exposure modeling for the blue whale and Atlantic spotted dolphin was not conducted because impacts on the species approach zero due to their low predicted densities in the Project Area. These species were excluded from quantitative analyses and tables. Results for these scenarios can be found in Appendix A in the ITA application.

^a The acoustic range can be found in Table H–41 in Appendix H of Ocean Wind's ITA application. The value shown here is for 170 dB as Appendix H did not account for 10 dB of sound attenuation.

TABLE 15—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT THRESHOLDS (SEL_{cum}) AND EXPOSURE RANGES ($ER_{95\%}$) AND ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL B HARASSMENT THRESHOLD (SPL_{rms}) FOR JACKET FOUNDATIONS (PIN PILES) IN THE WINTER (DECEMBER), ASSUMING 10–dB ATTENUATION; EXPOSURE DISTANCES FOR TWO (AND THREE) PIN PILES PER DAY

Marine mammal species	Exposure ranges ($ER_{95\%}$)		Acoustic range ($R_{95\%}$)
	Level A harassment (km)	Level B harassment (km)	Level B harassment (km)
North Atlantic right whale	0.69 (0.70)	2.06 (2.11)	a 2.522
Blue whale * .....	.....	.....
Fin whale	0.84 (0.74)	2.11 (2.04)	
Humpback whale	0.52 (0.51)	2.18 (2.11)	
Minke whale	0.58 (0.59)	2.09 (2.06)	
Sei whale	0.59 (0.53)	2.13 (2.03)	
Sperm whale	0 (0)	0 (0)	
Atlantic spotted dolphin * .....	.....	.....
Atlantic white-sided dolphin	0 (0)	2.12 (2.08)	
Bottlenose dolphin (offshore stock)	0 (0)	1.91 (1.85)	
Bottlenose dolphin (coastal stock)	0 (0)	1.97 (1.88)	
Common dolphin	0 (0)	2.09 (2.06)	
Long-finned pilot whale	0 (0)	0 (0)	
Short-finned pilot whale	0 (0)	0 (0)	
Risso's dolphin	0 (0)	1.93 (1.87)	
Harbor porpoise	0.63 (0.70)	2.16 (2.06)	
Gray seal	0 (<0.01)	2.33 (2.14)	

TABLE 15—EXPOSURE RANGES ($ER_{95\%}$) TO LEVEL A HARASSMENT THRESHOLDS (SEL_{cum}) AND EXPOSURE RANGES ($ER_{95\%}$ AND ACOUSTIC RANGES ($R_{95\%}$) TO LEVEL B HARASSMENT THRESHOLD (SPL_{rms}) FOR JACKET FOUNDATIONS (PIN PILES) IN THE WINTER (DECEMBER), ASSUMING 10-dB ATTENUATION; EXPOSURE DISTANCES FOR TWO (AND THREE) PIN PILES PER DAY—Continued

Marine mammal species	Exposure ranges ($ER_{95\%}$)		Acoustic range ($R_{95\%}$)
	Level A harassment (km)	Level B harassment (km)	Level B harassment (km)
Harbor seal	0 (<0.01)	2.24 (2.19)	

* Exposure modeling for the blue whale and Atlantic spotted dolphin was not conducted because impacts on the species approach zero due to their low predicted densities in the Project Area. These species were excluded from quantitative analyses and tables. Results for these scenarios can be found in Appendix A in the ITA application.

^a The acoustic range can be found in Table H-42 in Appendix H of Ocean Wind's ITA application. The value shown here is for 170 dB as Appendix H did not account for 10 dB of sound attenuation.

JASCO's Animal Simulation Model Including Noise Exposure (JASMINE) animal movement model was used to predict the number of marine mammals exposed to impact pile driving sound above NMFS' injury and behavioral harassment thresholds. Sound exposure models like JASMINE use animats to forecast behaviors of animals in new situations and locations based on previously documented behaviors of those animals. The predicted 3D sound fields (*i.e.*, the output of the acoustic modeling process described earlier) are sampled by animats using movement rules derived from animal observations. The output of the simulation is the exposure history for each animat within the simulation.

The precise location of animats (and their pathways) are not known prior to a project, therefore a repeated random sampling technique (Monte Carlo) is used to estimate exposure probability with many animats and randomized starting positions. The probability of an animat starting out in or transitioning into a given behavioral state can be defined in terms of the animat's current behavioral state, depth, and the time of day. In addition, each travel parameter and behavioral state has a termination function that governs how long the parameter value or overall behavioral state persists in the simulation.

The output of the simulation is the exposure history for each animat within the simulation, and the combined history of all animats gives a probability density function of exposure during the project. Scaling the probability density function by the real-world density of animals results in the mean number of animats expected to be exposed to a given threshold over the duration of the project. Due to the probabilistic nature of the process, fractions of animats may be predicted to exceed threshold. If, for example, 0.1 animats are predicted to exceed threshold in the model, that is

interpreted as a 10-percent chance that one animat will exceed a relevant threshold during the project, or equivalently, if the simulation were re-run 10 times, 1 of the 10 simulations would result in an animat exceeding the threshold. Similarly, a mean number prediction of 33.11 animats can be interpreted as re-running the simulation where the number of animats exceeding the threshold may differ in each simulation but the mean number of animats over all of the simulations is 33.11. A portion of an individual marine mammal cannot be taken during a project, so it is common practice to round mean number animat exposure values to integers using standard rounding methods. However, for low-probability events it is more precise to provide the actual values.

Sound fields were input into the JASMINE model, as described above, and animats were programmed based on the best available information to "behave" in ways that reflect the behaviors of the 17 marine mammal species (18 stocks) expected to occur in the Project Area during the proposed activity. The various parameters for forecasting realistic marine mammal behaviors (*e.g.*, diving, foraging, surface times, *etc.*) are determined based on the available literature (*e.g.*, tagging studies); when literature on these behaviors was not available for a particular species, it was extrapolated from a similar species for which behaviors would be expected to be similar to the species of interest. The parameters used in JASMINE describe animat movement in both the vertical and horizontal planes (*e.g.*, direction, travel rate, ascent and descent rates, depth, bottom following, reversals, inter-dive surface interval).

Animats were modeled to move throughout the 3D sound fields produced by each construction schedule for the entire construction period. For

PTS exposures, both SPL_{pk} and SEL_{cum} were calculated for each species based on the corresponding acoustic criteria. Once an animat is taken within a 24-hour period, the model does not allow it to be taken a second time in that same period, but rather resets the 24-hour period on a sliding scale across 7 days of exposure. Specifically, an individual animat's accumulated energy levels (SEL_{cum}) are summed over that 24-hour period to determine its total received energy, and then compared to the PTS threshold. Takes by behavioral harassment are predicted when an animat enters an area ensounded by sound levels exceeding the associated behavioral harassment threshold.

It is important to note that the calculated or predicted takes represent a take instance or event within 1 day and likely overestimate the number of individuals taken for some species. Specifically, as the 24-hour evaluation window means that individuals exposed on multiple days are counted as multiple takes. For example, 10 takes may represent 10 takes of 10 different individual marine mammals occurring within 1 day each, or it may represent take of 1 individual on 10 different days; information about the species' daily and seasonal movement patterns helps to inform the interpretation of these take estimates. Also note that animal aversion was not incorporated into the JASMINE model runs that were the basis for the take estimate for any species.

To conservatively estimate the number of animals likely to be exposed above thresholds, 60 WTG monopiles (at a rate of 2 per day for 30 days) were assumed to be installed during the highest density month of each species. Additionally, 38 WTG monopiles (at a rate of 2 per day for 19 days) were also assumed to be installed during the month with the second highest species density. The scenario for the three OSS

foundations was assumed to consist of 48 pin piles (at a rate of 3 per day for a total of 16 days). The estimated construction schedule is shown below in Table 16.

TABLE 16—CONSTRUCTION SCHEDULE ASSUMPTIONS FOR WTG AND OSS FOUNDATIONS

Foundation type	Configuration	Days of impact pile driving	
		First highest density month	Second highest density month
Wind Turbine Generator (WTG)	Monopile foundation, 2 piles per day	30	19
Offshore Substation (OSS)	Jacket foundation, 3 pin piles per day	16	0

Note:—Indicate no piling days.

In summary, exposures were estimated in the following way:

(1) The characteristics of the sound output from the proposed pile-driving activities were modeled using the GRLWEAP (wave equation analysis of pile driving) model and JASCO's PDSM;

(2) Acoustic propagation modeling was performed within the exposure model framework using JASCO's MONM and FWRAM that combined the outputs of the source model with the spatial and temporal environmental context (e.g., location, oceanographic conditions, seabed type) to estimate sound fields;

(3) Animal movement modeling integrated the estimated sound fields with species-typical behavioral parameters in the JASMINE model to estimate received sound levels for the animals that may occur in the operational area for each piling scenario (e.g., two monopiles per day); and

(4) The number of potential exposures above Level A harassment and Level B harassment thresholds were calculated per month and then results from all months were summed.

The results of marine mammal exposure modeling for the joint foundation approach (WTGs use

monopiles; OSSs use jackets with pin piles) over 5 years assuming 10–dB attenuation only are shown in Tables 17 and 18, as these form the basis for the authorized take. These values were presented by Ocean Wind after the habitat-based density models were updated; please see the Revised Density and Take Estimate Memo available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility-for-more-information>.

TABLE 17—MODELED POTENTIAL LEVEL A HARASSMENT AND LEVEL B HARASSMENT EXPOSURES (ASSUMING 10–dB SOUND ATTENUATION) DUE TO IMPACT PILE DRIVING OF A MONOPILE FOUNDATION (ASSUMING 98 TOTAL MONOPILES FOR WTGS) OVER 5 YEARS

Marine mammal species	Population estimate	Level A harassment (SEL _{cum})	Level B harassment (160 dB _{rms})
North Atlantic right whale ^a	338	^c 0.9	3.11
Blue whale ^a	^b Unknown	^e n/a	^e n/a
Fin whale ^a	6,802	3.69	7.05
Humpback whale	1,396	4.24	13.82
Minke whale	21,968	18.42	52.25
Sei whale ^a	6,292	0.89	2.00
Sperm whale ^a	4,349	0	0
Atlantic spotted dolphin	39,921	^e n/a	^e n/a
Atlantic white-sided dolphin	93,233	0	71.5
Bottlenose dolphin (offshore stock)	62,851	0	935.91
Bottlenose dolphin (coastal stock)	6,639	0	0
Common dolphin	172,974	0	1,229.37
Long-finned pilot whale	39,215	0	0
Short-finned pilot whale	28,924	0	0.04
Risso's dolphin	35,215	0	7.06
Harbor porpoise ^d	95,543	51.31	233.89
Gray seal	27,300	3.04	197.56
Harbor seal	61,336	12.16	554.22

^a—Listed as Endangered under the Endangered Species Act (ESA)

^b—The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^c—Level A harassment exposures were initially estimated for this species, but due to the mitigation measures that Ocean Wind will be required to abide by, no Level A harassment take is expected, nor authorized. Instead, any exposure estimates that predicted Level A harassment were added to the authorized Level B harassment take.

^d—The calculated Level A exposures are likely an overestimate as the modeled 10-dB sound reduction from the noise mitigation systems does not take into account that the reduction is greater at higher frequencies, which are best heard by harbor porpoises.

^e—Exposure modeling for blue whales and Atlantic spotted dolphins was not conducted because the impacts on the species approached zero due to the low density estimates. Because of this, values for these species have been excluded from the quantitative analyses.

TABLE 18—MODELED POTENTIAL LEVEL A HARASSMENT AND LEVEL B HARASSMENT EXPOSURES (ASSUMING 10–dB OF SOUND ATTENUATION) DUE TO IMPACT PILE DRIVING OF OSS FOUNDATIONS (ASSUMING THREE JACKETS WITH 48 PIN PILES) OVER 5 YEARS

Marine mammal species	Population estimate	Level A harassment (SEL _{cum})	Level B harassment (160 dB _{rms})
North Atlantic right whale ^a	338	^c 0.10	0.75
Blue whale ^a	^b Unknown	^e n/a	^e n/a
Fin whale ^a	6,802	0.48	1.20
Humpback whale	1,396	0.54	3.63
Minke whale	21,968	2.29	15.81
Sei whale ^a	6,292	0.14	0.45
Sperm whale ^a	4,349	0	0
Atlantic spotted dolphin	39,921	^e n/a	^e n/a
Atlantic white-sided dolphin	93,233	0	16.20
Bottlenose dolphin (offshore stock)	62,851	0	168.23
Bottlenose dolphin (coastal stock)	6,639	0	0
Common dolphin	172,974	0	293.89
Long-finned pilot whale	39,215	0	0
Short-finned pilot whale	28,924	0	0
Risso's dolphin	35,215	0	1.79
Harbor porpoise ^d	95,543	16.60	70.97
Gray seal	27,300	0.32	38.59
Harbor seal	61,336	0.43	99.14

^a—Listed as Endangered under the Endangered Species Act (ESA)

^b—The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^c—Level A harassment exposures were initially estimated for this species, but due to the mitigation measures that Ocean Wind will be required to abide by, no Level A harassment take is expected, nor authorized. Instead, any exposure estimates that predicted Level A harassment were added to the authorized Level B harassment take.

^d—The calculated Level A harassment exposures are likely an overestimate as the modeled 10-dB sound reduction from the noise mitigation systems does not take into account that the reduction is greater at higher frequencies, which are best heard by harbor porpoises.

^e—Exposure modeling for blue whales and Atlantic spotted dolphins was not conducted because the impacts on the species approached zero due to the low density estimates. Because of this, values for these species have been excluded from the quantitative analyses.

Based on the exposure estimates for impact pile driving activities related to WTGs and OSS installation (monopile foundations and jacket foundations with pin piles), the authorized take is shown below in Tables 19 and 20. To determine the authorized take numbers, the calculated exposures were rounded to the next whole number, except where

explanations have been provided to predict zero takes or to round up to average group size (see footnotes).

We note here that based on a comment from the Marine Mammal Commission, NMFS, in consultation with JASCO and Ocean Wind, has opted to allocate 10 percent of the authorized take of the offshore stock of bottlenose

dolphins to the coastal stock during foundation installation. This does not change the total take numbers presented for these two stocks in Tables 33 and 34 at the end of the Estimated Take section. No takes of Level A harassment has been authorized for either of these stocks.

TABLE 19—AUTHORIZED TAKE FROM LEVEL A HARASSMENT AND LEVEL B HARASSMENT RESULTING FROM IMPACT PILE DRIVING ASSOCIATED WITH THE WTG 8/11-m MONOPILE FOUNDATIONS (ASSUMING 98 TOTAL) OVER 5 YEARS

Marine mammal species	Population estimate	Authorized Level A harassment	Authorized Level B harassment
North Atlantic right whale ^a	338	^b 0	4
Blue whale ^a	Unknown	0	^c 4
Fin whale ^a	6,802	4	8
Humpback whale	1,396	5	14
Minke whale	21,968	19	53
Sei whale ^a	6,292	1	^d 2
Sperm whale ^a	4,349	0	^d 3
Atlantic spotted dolphin	39,921	0	^d 45
Atlantic white-sided dolphin	93,233	0	72
Bottlenose dolphin (offshore stock)	62,851	0	^e 842
Bottlenose dolphin (coastal stock)	6,639	0	^e 94
Common dolphin	172,974	0	1,230
Long-finned pilot whale	39,215	0	^d 10
Short-finned pilot whale	28,924	0	^d 10
Risso's dolphin	35,215	0	^d 30
Harbor porpoise	95,543	52	234
Gray seal	27,300	4	198
Harbor seal	61,336	13	555

^a—Listed as Endangered under the Endangered Species Act (ESA).

b—JASCO's modeling estimated 0.90 Level A harassment exposures for North Atlantic right whales, but due to mitigation measures (see the Mitigation section), no Level A harassment takes are expected or authorized.

c—No Level B harassment exposures were estimated for blue whales, but up to four Level B harassment takes, which were not calculated through density estimates, are proposed in the event that four individuals approach the WTG foundation during installations.

d—The authorized take for sei whales (Kenney and Vigness-Raposa, 2010), sperm whales (Barkaszi and Kelly, 2019), Atlantic spotted dolphins (Kenney and Vigness-Raposa, 2010), both species of pilot whales (Kenney and Vigness-Raposa, 2010), and Risso's dolphins (Barkaszi and Kelly, 2019) was adjusted based on mean group size.

e—Based on a comment provided by the Commission, NMFS, in consultation with JASCO and Ocean Wind, have opted to allocate 10 percent of the authorized take by Level B harassment of the offshore stock of bottlenose dolphins to the coastal stock during WTG installation. No takes of Level A harassment has been authorized for either of these stocks.

TABLE 20—AUTHORIZED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKE RESULTING FROM IMPACT PILE DRIVING ASSOCIATED WITH OSS 2.44-m JACKET FOUNDATION USING PIN PILES (48 TOTAL PIN PILES) OVER 5 YEARS

Marine mammal species	Population estimate	Authorized Level A harassment	Authorized Level B harassment
North Atlantic right whale ^a	338	0	1
Blue whale ^a	Unknown	0	0
Fin whale ^a	6,802	0	2
Humpback whale	1,396	^c 2	^c 46
Minke whale	21,968	3	16
Sei whale ^a	6,292	0	0
Sperm whale ^a	4,349	0	^b 3
Atlantic spotted dolphin	39,921	0	^b 45
Atlantic white-sided dolphin	93,233	0	17
Bottlenose dolphin (offshore stock)	62,851	0	169
Bottlenose dolphin (coastal stock)	6,639	0	0
Common dolphin	172,974	0	294
Risso's dolphin	35,215	0	^b 30
Long-finned pilot whale	39,215	0	^b 10
Short-finned pilot whale	28,924	0	^b 10
Harbor porpoise	95,543	17	71
Gray seal	27,300	0	39
Harbor seal	61,336	0	100

a—Listed as Endangered under the Endangered Species Act (ESA).

b—The authorized take for sei whales (Kenney and Vigness-Raposa, 2010), sperm whales (Barkaszi and Kelly, 2019), Atlantic spotted dolphins (Kenney and Vigness-Raposa, 2010), both species of pilot whales (Kenney and Vigness-Raposa, 2010), and Risso's dolphins (Barkaszi and Kelly, 2019) was adjusted based on mean group size.

c—Based on a comment received from the Marine Mammal Commission, NMFS has increased the authorized take by Level A harassment for OSS impact installation from one to two (representing a single group size of 1.6 animals based on AMAPPS data). For take by Level B harassment, NMFS has incorporated the Commission's suggestion of increasing the take to 46 instances, based on the group size seen in a previous monitoring report.

Temporary Cofferdam and Goal Post Installation and Removal

Similar to the impact pile driving source level modeling, vibratory driving sound source characteristics were generated using the GRLWEAP 2010 wave equation model (Pile Dynamics, Inc., 2010). Installation and removal of the cofferdams were modeled from a single location that was deemed representative of the two potential cable routes. The radiated sound waves were modeled as discrete point sources over the full length of the pile in the water. Ocean Wind did not propose to employ noise mitigation during vibratory piling and NMFS is not requiring it in the Mitigation section; therefore, no noise abatement was applied or assumed.

To estimate the sound field to harassment isopleths generated during installation and removal of cofferdams and goal posts during vibratory pile driving, a practical spreading loss model was used. For cofferdams, a source level of 165 dB re 1 μ Pa was used (JASCO,

2021). A lower source level (162 dB re 1 μ Pa) was used for the 20-inch (50.8 centimeter (cm)) goal posts (based upon 18-inch (45.7 cm) piles from the Naval Facilities Engineering Systems Command (NAVFAC) mid-Atlantic (2019), as cited in 87 FR 78072). A transmission loss coefficient of 15logR (cylindrical spreading) was assumed for both cofferdams and goal posts. Ocean Wind did not separately analyze the removal of the cofferdams and goal posts using a vibratory extractor but has assumed that the removal would be acoustically comparable to the installation. Based on available pile-driving data presented from Caltrans (2020), this is a conservative assumption.

Given the short duration of the activity and shallow, near coast location, animat exposure modeling was not conducted for cofferdams and goal posts installation and removal to determine potential exposures from vibratory pile driving. Rather, the

modeled acoustic range distances to isopleths corresponding to the relatively small Level A harassment and Level B harassment threshold values were used to calculate the area around the cofferdams and goal posts predicted to be ensonified daily to levels that exceed the thresholds, or the Ensonified Area. The Ensonified Area is calculated as the following:

$$\text{Ensonified Area} = \pi r^2,$$

Where r is the linear acoustic range distance from the source to the isopleth to Level A harassment or Level B harassment thresholds.

The Level A harassment and Level B harassment threshold distances were mapped in a geospatial information system software (GIS) to remove any areas that overlapped land masses or areas where water was blocked by land as these areas would not be ensonified during cofferdams and goal posts installation and removal. These results are shown in Table 21.

TABLE 21—AREAS CALCULATED FOR THE MAXIMUM LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLD DISTANCES FOR VIBRATORY INSTALLATION AND REMOVAL OF COFFERDAMS AND GOAL POSTS

Cofferdam and goal post location	Area of level A harassment zone (km ²)				Area of level B harassment zone (km ²)
	Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocids	
Temporary Goal Posts					
IBSP Atlantic HDD	<0.001	<0.001	<0.001	<0.0001	66.18
BL England HDD	<0.001	<0.001	<0.001	<0.0001	65.05
Temporary Cofferdams					
Oyster Creek HDD	0.024	<0.0001	0.052	0.009	77.01
IBSP Barnegat Bay HDD	0.024	<0.0001	0.052	0.009	76.70

Animal movement and exposure modeling was not performed by JASCO to determine potential exposures from vibratory pile driving. Rather, the average monthly density value from October through May for each marine mammal species (refer back to Table 8) were then multiplied by the estimated Level A harassment and Level B harassment areas (in km²) and the expected durations for each component of the cofferdam and goal post process

(i.e., installation and removal). Finally, the resulting value was multiplied by the number of activity days. It was conservatively estimated that temporary cofferdams would require 4 days to install and remove (2 days for each activity). For goal posts, it was estimated that installation and removal would occur over 6 days, assuming 3 days for installation and 3 days for removal at a rate of 1 hour daily (30

minutes for each pile at a rate of two piles per day).

As previously stated, Ocean Wind anticipates that cofferdam and goal post installation and removal would occur only during Year 1 of the construction activities, specifically from October through March, although a small number of cofferdams and goal post removals could occur in Year 2 during April or May, but it is not expected.

TABLE 22—ESTIMATED LEVEL B HARASSMENT EXPOSURES BY MONTH FROM VIBRATORY PILE INSTALLATION AND REMOVAL RELATED TO COFFERDAMS (AND GOAL POSTS IN PARENTHESIS)

Marine mammal species	Population estimate	January	February	March	April	May	October	November	December	Average Exposures ^c
North Atlantic right whale ^a ..	338	2.08 (1.60)	1.71 (1.31)	0.97 (0.74)	0.55 (0.42)	0.13 (0.10)	0.09 (0.07)	0.41 (0.31)	1.20 (0.92)	0.89 (0.68)
Blue whale ^a	^b Unknown	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)	0.02 (0.02)
Fin whale ^a	6,802	2.21 (1.69)	0.65 (0.50)	1.30 (1.00)	1.64 (1.26)	0.57 (0.44)	0.54 (0.41)	0.55 (0.42)	2.56 (1.96)	1.25 (0.96)
Humpback whale	1,396	2.25 (1.73)	1.51 (1.16)	2.28 (1.75)	1.56 (1.20)	0.83 (0.64)	0.90 (0.69)	2.13 (1.63)	4.26 (3.27)	1.96 (1.51)
Minke whale	21,968	0.42 (0.32)	0.48 (0.37)	0.68 (0.52)	0.40 (0.21)	7.42 (5.69)	0.94 (0.72)	0.12 (0.09)	0.28 (0.21)	2.47 (1.89)
Sei whale ^a	6,292	0.40 (0.31)	0.26 (0.20)	0.48 (0.37)	0.61 (0.47)	0.29 (0.22)	0.09 (0.07)	0.44 (0.34)	0.91 (0.70)	0.44 (0.33)
Sperm whale ^a ..	4,349	0.03 (0.02)	0.04 (0.03)	0.02 (0.01)	0.06 (0.04)	0.08 (0.06)	0.00 (0.00)	0.15 (0.12)	0.09 (0.07)	0.06 (0.04)
Atlantic spotted dolphin	39,921	n/a (n/a)	n/a (n/a)	n/a (n/a)	n/a (n/a)	n/a (n/a)	n/a (n/a)	n/a (n/a)	n/a (n/a)	n/a (n/a)
Atlantic white-sided dolphin	93,233	1.49 (1.14)	0.96 (0.73)	1.47 (1.12)	3.84 (2.95)	2.11 (1.62)	1.91 (1.47)	4.06 (3.11)	3.76 (2.88)	2.45 (1.88)
Bottlenose dolphin (offshore stock)	62,851	120.06 (92.10)	38.12 (29.24)	60.99 (46.79)	260.70 (199.98)	653.27 (501.10)	1,019.85 (782.31)	951.596 (729.94)	670.22 (514.11)	471.85 (361.94)
Bottlenose dolphin (coastal stock)	6,639	161.51 (123.89)	61.44 (47.13)	137.20 (105.24)	696.39 (534.19)	1,745.23 (1,338.72)	2,378.69 (1,824.63)	1,988.58 (1,525.39)	1,076.10 (825.45)	1,030.64 (790.58)
Common dolphin	172,974	7.05 (5.41)	3.05 (2.34)	5.43 (4.17)	13.05 (10.01)	8.91 (6.84)	6.24 (4.79)	36.20 (27.77)	24.03 (18.43)	12.99 (9.97)
Long-finned pilot whale	39,215	0.1 (0.0)	0.01 (0.0)	0.1 (0.0)	0.1 (0.0)	0.1 (0.0)	0.1 (0.0)	0.1 (0.0)	0.1 (0.0)	0.1 (0.0)
Short-finned pilot whale	28,924	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)	0.0 (0.0)
Risso's dolphin	35,215	0.01 (0.01)	0.00 (0.00)	0.00 (0.00)	0.03 (0.02)	0.02 (0.02)	0.02 (0.01)	0.11 (0.09)	0.21 (0.16)	0.05 (0.04)
Harbor porpoise	95,543	39.03 (29.94)	34.32 (26.33)	39.17 (30.04)	51.95 (39.85)	10.28 (7.89)	0.18 (0.14)	0.69 (0.53)	41.18 (31.59)	27.10 (20.79)
Gray seal	27,300	102.96 (78.98)	73.31 (56.24)	81.20 (62.29)	131.83 (101.12)	84.76 (65.02)	126.98 (97.40)	182.25 (139.80)	131.44 (100.83)	114.34 (87.71)
Harbor seal	61,336	287.77 (220.74)	294.92 (157.19)	226.96 (174.09)	368.48 (282.65)	236.92 (181.73)	354.92 (272.25)	509.40 (390.75)	367.39 (281.82)	319.59 (245.15)

Note: The values for goal posts are presented in parenthesis.

^a—Listed as Endangered under the Endangered Species Act (ESA).^b—The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our analysis.^c—The average exposure values were calculated using the October–May columns.

For Level A harassment from goal post installation, the monthly exposures were less than 0.01 for all species (see Table 6–9 in the Cofferdam Change Memo). For cofferdams, the Level A harassment was less than 0.01 for all species except harbor porpoise and harbor seals, which had few monthly totals that were greater than 0.01, but were always less than 0.04 (see Table 6–9 in the Revised Density and Take Estimate Memo). For the Level B harassment for cofferdams and goal

posts, this yielded the exposure estimates found in Table 22. Because of this, Ocean Wind anticipates and NMFS has only authorized Level B harassment from vibratory installation and removal of the cofferdams and goal posts. However, at request of Ocean Wind, some Level A harassment takes of the coastal stock of bottlenose dolphins and both species of phocids have been authorized given the coastal location that these activities.

From the exposures calculated shown in Table 22, Ocean Wind utilized the average monthly value from October through May in their take request, which are shown in Table 23. For some species, calculated Level B harassment exposures were zero or very low, but Ocean Wind requested take of an average group size and NMFS concurred this was appropriate for authorization given the species potential occurrence in the area.

TABLE 23—AUTHORIZED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKE RESULTING FROM VIBRATORY PILE DRIVING ASSOCIATED WITH THE INSTALLATION AND REMOVAL OF TEMPORARY COFFERDAMS AND GOAL POSTS OVER 5 YEARS

Marine mammal species	Population estimate	Authorized level A harassment	Authorized level B harassment
North Atlantic right whale ^a	338	0	1
Blue whale ^a	Unknown	0	0
Fin whale ^a	6,802	0	1
Humpback whale	1,396	0	2
Minke whale	21,968	0	2
Sei whale ^a	6,292	0	1
Sperm whale ^a	4,349	0	0
Atlantic spotted dolphin	39,921	0	^b 45
Atlantic white-sided dolphin	93,233	0	^g 12
Bottlenose dolphin (offshore stock)	62,851	0	362
Bottlenose dolphin (coastal stock) ^f	6,639	^c 11	791
Common dolphin	172,974	0	^g 30
Long-finned pilot whale	39,215	0	^d 10
Short-finned pilot whale	28,924	0	^d 10
Risso's dolphin	35,215	0	^d 30
Harbor porpoise	95,543	0	21
Gray seal	27,300	^e 28	88
Harbor seal	61,336	^e 28	246

^a—Listed as Endangered under the Endangered Species Act (ESA).

^b—No Level B harassment exposures were estimated for Atlantic spotted dolphins, but NMFS has authorized a group size estimate of up to 45 Level B harassment takes.

^c—No Level A harassment exposures were estimated for bottlenose dolphins of the coastal stock, but NMFS has authorized a group size estimate of up to 11 Level A harassment takes.

^d—Authorized takes by Level B harassment for pilot whales (short-finned and long-finned; Kenney and Vigness-Raposa, 2010) and Risso's dolphins (Barkaszi and Kelly, 2019) were adjusted to account for an average pod size.

^e—No Level A harassment exposures were estimated for gray seals and harbor seals, but 28 Level A harassment takes have been authorized in the event up to 2 animals are taken during either removal or installation of cofferdam and goal posts due to the nearshore location of the cofferdams and goal posts and seal haul outs.

^f—The estimate for coastal bottlenose dolphins (bayside versus Atlantic Ocean-facing) is likely an overestimate as this stock has demonstrated a preference for coastal environments as opposed to estuarine (Toth et al., 2011).

^g—Based on a comment from the Marine Mammal Commission, NMFS has increased the take of common dolphins and Atlantic white-sided dolphins by a single group size using data from AMAPPS.

UXO/MEC Detonation

To assess the impacts from UXO/MEC detonations, JASCO conducted acoustic modeling based on previous underwater acoustic assessment work that was performed jointly between NMFS and the United States Navy. JASCO evaluated the effects thresholds (for TTS, PTS, non-auditory injury, and mortality) based on the appropriate metrics to use as indicators of disturbance and injury: (1) peak pressure level; (2) sound exposure level (SEL); and (3) acoustic impulse. Charge weights of 2.3 kg (5.1 pounds (lbs)), 9.1 kg (20.1 lbs), 45.5 kg (100.3 lbs), 227 kg

(500 lbs), and 454 kg (1,000.9 lbs), which is the largest charge the Navy considers for the purposes of its analyses (see the Description of the Specified Activities section in the proposed rule), were modeled to determine the ranges to mortality, gastrointestinal injury, lung injury, PTS, and TTS thresholds. These charge weights were modeled at four different locations off Massachusetts, consisting of different depths (12 m (Site S1), 20 m (Site S2), 30 m (Site S3), and 45 m (Site S4)). The sites were deemed to be representative of both the export cable route and the Lease Area.

Here, we present distances to PTS and TTS thresholds for all UXO/MEC charge weights. In the proposed rule, we only described the distances to thresholds for the largest E12 charge weight. However, as already described, Ocean Wind will be able to identify and mitigate at the relevant distances for each specific charge weight, so we have incorporated the maximum values for each size herein. Due to the implementation of mitigation and monitoring measures, the potential for mortality and non-auditory injury is low and Ocean Wind did not request, and we are not authorizing take by mortality or non-auditory injury. For this reason we are not presenting all

modeling results here; however, they can be found in Appendix C of the application.

UXOs/MECs were modeled at the following locations, as they were determined to be representative of the environment in the Ocean Wind Project Area:

- *Shallow water ECR*: Site S1; In the channel within Narragansett Bay (12 m depth);
- *Shallow water ECR*: Site S2; Intermediate waters outside of Narragansett Bay (20 m depth);
- *Shallow water Lease Area*: Site S3; Shallower waters in the southern portion of the Hazard Zone 2 area (30 m depth);
- *Deeper water Lease Area*: Site S4; Deeper waters in northern portion of the Hazard Zone 2 area (45 m depth).

In their UXO/MEC modeling report (Appendix C of Ocean Wind's ITA application), JASCO notes that although the sample sites were located offshore of Massachusetts, the chosen sites share similar depths, sea surface, and seabed conditions as the Project Area where the Project would be developed and making it an ideal as a proxy.

Based on the depths within the ECR Area, Site S1 (12 m) was chosen as the most representative depth to assess UXO/MEC detonations within the export cable route corridor. Sites S2, S3, and S4 (20 m, 30 m, and 45 m,

respectively) are applicable to the Lease Area (*i.e.*, location of the WTGs and OSSs). The SEL-based ($R_{95\%}$) isopleths for Level A harassment (PTS) and Level B harassment (TTS) were calculated from the horizontal distances shown in Tables 24 and 25. For all species, the distance to the SEL thresholds exceeded that for the peak thresholds. Model results for all sites and all charge weights can be found in Appendix C of Ocean Wind's application. JASCO has also presented the results for both mitigated and unmitigated scenarios in the ITA application; however, Ocean Wind has committed to the use of a noise mitigation system during all detonations, and plans to use abatement systems capable of reducing noise by 10 dB. As a result, the August 2022 Revised Density and Take Estimate Memo carried forward only the mitigated UXO/MEC scenario and only the attenuated results, as presented in Tables 24 and 25, were carried forward into the exposure and take estimation. Additional information can be found in JASCO's UXO/MEC report and the Revised Density and Take Estimate Memo on NMFS' website (<https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>).

NMFS notes that the more detailed results for the mortality and non-

auditory injury analysis to marine mammals for onset gastrointestinal injury, onset lung injury, and onset of mortality can be found in Appendix C of the ITA application, which can be found on NMFS' website. NMFS concurs with Ocean Wind's analysis and does not expect or authorize any non-auditory injury, serious injury, or mortality of marine mammals from UXO/MEC detonation. The modeled distances to the mortality threshold for all UXO/MECs sizes for all animal masses are small (*i.e.*, 5–553 m; see Table 38 in Appendix C of Ocean Wind's application), as compared to the distance/area that can be effectively monitored. The modeled distances to non-auditory injury thresholds range from 5–658 m (see Tables 30 and 34 in Appendix C of the application). Ocean Wind is required to conduct extensive monitoring using both PSOs and PAM operators and clear an area of marine mammals prior to detonating any UXO/MEC. Given that Ocean Wind will be employing multiple platforms to visually monitor marine mammals as well as passive acoustic monitoring, it is reasonable to assume that marine mammals would be reliably detected within approximately 660 m of the UXO/MEC being detonated and mortality or non-auditory injury is considered not likely to occur.

TABLE 24—SEL-BASED $R_{95\%}$ PTS-ONSET RANGES, IN METERS, FROM ALL SITE MODELED DURING UXO/MEC DETONATION BY CHARGE WEIGHT, ASSUMING 10-dB SOUND ATTENUATION

Marine mammal hearing group	2.3 kg (5.1 lbs)		9.1 kg (20.1 lbs)		45.5 kg (100.3 lbs)		227 kg (500 lbs)		454 kg (1,000.9 lbs)	
	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$
LFC	632	552	1,230	982	2,010	1,730	3,370	2,970	4,270	3,780
MFC	<50	<50	79	75	175	156	419	337	535	461
HFC	2,100	1,820	3,020	2,590	4,400	3,900	6,130	5,400	6,960	6,200
PP	192	182	413	357	822	690	1,410	1,220	1,830	1,600

Note: LFC = low-frequency cetaceans; MFC = mid-frequency cetaceans; HFC = high-frequency cetaceans; PP = phocid pinnipeds

TABLE 25—SEL-BASED $R_{95\%}$ TTS-ONSET RANGES, IN METERS, FROM ALL SITE MODELED DURING UXO/MEC DETONATION BY CHARGE WEIGHT, ASSUMING 10-dB SOUND ATTENUATION

Marine mammal hearing group	2.3 kg (5.1 lbs)		9.1 kg (20.1 lbs)		45.5 kg (100.3 lbs)		227 kg (500 lbs)		454 kg (1,000.9 lbs)	
	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$	R_{\max}	$R_{95\%}$
LFC	3,140	2,820	5,230	4,680	8,160	7,490	11,700	10,500	13,500	11,900
MFC	535	453	910	773	1,520	1,240	2,400	2,120	2,930	2,550
HFC	6,920	6,160	8,970	8,000	11,300	10,300	14,600	12,900	15,600	14,100
PP	1,730	1,470	2,710	2,350	4,340	3,820	6,640	5,980	7,820	7,020

Note: LFC = low-frequency cetaceans; MFC = mid-frequency cetaceans; HFC = high-frequency cetaceans; PP = phocid pinnipeds

JASCO's take estimate analysis assumed that all 10 of the UXOs/MECs would be 454 kg in weight. Although Ocean Wind does not expect that all UXOs/MECs will consist of this charge weight, they assumed as much to be conservative in estimating take. The take estimate calculations assume that the ten 454 kg charges would be split between the different depths (20 m to 45 m), as these were considered representative for the Project Area.

To calculate the potential marine mammal exposures from any UXO/MEC detonations, the horizontal distances from Tables 24 and 25 were multiplied by the highest monthly species density in the Lease Area (based on the Revised Density and Take Estimate Memo) for each of the 20-m to 45-m representative depths and by the highest monthly species density in the export cable route

for the 12-m depth (see Table 9 for the densities used and Table 6—Y NEW from the Revised Density and Take Estimate Memo for all of the available densities from May through October). The resulting value from the areas multiplied by the respective species densities were then multiplied by the number of UXOs/MECs estimated at each of the depths (2 UXOs/MECs at 12 m, 3 UXOs/MECs at 20 m, 3 UXOs/MECs at 30 m, and 2 UXOs/MECs at 40 m), for a total of 10 predicted UXOs/MECs. Ocean Wind has committed not to conduct more than one UXO/MEC detonation on any given day.

Level A harassment exposures resulting from UXO/MEC detonations are considered unlikely, but possible. To reduce impacts, a noise abatement system (likely a double big bubble curtain or similar device) capable of

achieving 10 dB of sound attenuation would be implemented. This level of sound reduction is considered achievable and reasonable given work being done in European waters (Bellmann *et al.*, 2020; Bellmann and Betke, 2021).

The estimated maximum PTS and TTS exposures assuming 10 dB of sound attenuation are presented in Table 26. These results are found in Appendix C, Table 29, of Ocean Wind's ITA application (Ocean Wind, 2022b). As indicated previously, where there is no more than one detonation per day, the TTS threshold is expected to also appropriately represent the level above which any behavioral disturbance might occur; so the Level B harassment exposures noted below could include TTS or behavioral disturbance.

TABLE 26—ESTIMATED POTENTIAL MAXIMUM PTS AND TTS EXPOSURES OF MARINE MAMMALS RESULTING FROM THE POSSIBLE DETONATIONS OF UP TO 10 UXOs/MECs, ASSUMING 10-dB OF SOUND ATTENUATION

Marine mammal species	Population estimate	Level A harassment (PTS SEL)	Level B harassment (TTS SEL)
North Atlantic right whale ^{a,c}	338	0.03	0.35
Blue whale ^a	^b Unknown	<0.01	0.04
Fin whale ^a	6,802	0.28	2.87
Humpback whale	1,396	0.33	3.41
Minke whale	21,968	2.53	26.42
Sei whale ^a	6,292	0.08	0.87
Sperm whale ^a	4,349	<0.01	0.01
Atlantic spotted dolphin	39,921	n/a	n/a
Atlantic white-sided dolphin	93,233	0.03	1.05
Bottlenose dolphin (offshore stock)	62,851	0.68	24.36
Bottlenose dolphin (coastal stock)	6,639	3.84	137.31
Common dolphin	172,974	0.13	4.65
Long-finned pilot whale	28,924	<0.01	0.02
Short-finned pilot whale	39,215	<0.01	0.02
Risso's dolphin	35,215	<0.01	0.04
Harbor porpoise	95,543	9.49	46.50
Gray seal	27,300	2.28	50.98
Harbor seal	61,336	6.39	142.49

^a—Listed as Endangered under the Endangered Species Act (ESA).

^b—The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^c—Level A harassment exposures were estimated for this species, but due to mitigation measures outlined in Section 11, no Level A harassment takes are expected or have been authorized. See Section 6.2.3 of the ITA application for more information.

Table 27 presents the attenuated (10-dB) authorized take that exceeds the PTS and TTS thresholds. Although the original ITA application described and analyzed the unattenuated estimates given uncertainty with exact mitigation

during UXO/MEC detonations, given the commitment by Ocean Wind to mitigate the UXO/MEC detonations, NMFS concurs that it is appropriate to carry forward the take estimates from the mitigated (10-dB sound attenuation)

scenario that are found in the Revised Density and Take Estimate Memo received in August 2022 (refer to Table 6–20 in the memo).

TABLE 27—AUTHORIZED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKES RESULTING FROM THE DETONATION OF UP TO 10 UXOs, ASSUMING 10-dB OF SOUND ATTENUATION, OVER 5 YEARS

Marine mammal species	Population estimate	Authorized Level A harassment	Authorized Level B harassment
North Atlantic right whale ^a	338	0	1
Blue whale ^a	^d Unknown	0	0
Fin whale ^a	6,802	0	3

TABLE 27—AUTHORIZED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKES RESULTING FROM THE DETONATION OF UP TO 10 UXOs, ASSUMING 10-dB OF SOUND ATTENUATION, OVER 5 YEARS—Continued

Marine mammal species	Population estimate	Authorized Level A harassment	Authorized Level B harassment
Humpback whale	1,396	0	4
Minke whale	21,968	^b e 2	27
Sei whale ^a	6,292	0	1
Sperm whale ^a	4,349	0	^c 3
Atlantic spotted dolphin	39,921	0	^c 45
Atlantic white-sided dolphin	93,233	0	2
Bottlenose dolphin (offshore stock)	62,851	^b e 11	25
Bottlenose dolphin (coastal stock)	6,639	^b e 11	138
Common dolphin	172,974	0	5
Long-finned pilot whale	39,215	0	^c 10
Short-finned pilot whale	28,924	0	^c 10
Risso's dolphin	35,215	0	^c 30
Harbor porpoise	95,543	10	47
Gray seal	27,300	3	51
Harbor seal	61,336	7	143

^a—Listed as Endangered under the Endangered Species Act (ESA).

^b—A small amount of Level A harassment exposures were estimated based on the density calculations, but no Level A harassment take was requested for authorization due to the mitigation measures Ocean Wind would be required to implement.

^c—The authorized take for the sperm whale (Barkaszi and Kelly, 2019), the Atlantic spotted dolphin (Kenny and Vigness-Raposa, 2010), both pilot whale species (Kenny and Vigness-Raposa, 2010), and the Risso's dolphins (Barkaszi and Kelly, 2019) were adjusted based on mean group size.

^d—The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^e—Based on a comment received by the Marine Mammal Commission during the public comment period, NMFS has increased the authorized take for minke whales, based on a single group size from the AMAPPS dataset, and bottlenose dolphins (both stocks) to a single group size using a group size data from Ocean Wind.

While there would be no more than 10 detonations of UXOs/MECs and these detonations are of very short duration (approximately 1 second), UXO/MEC detonations have a higher potential to cause mortality and injury than other Project activities and therefore have specific mitigation measures designed to minimize the likelihood of mortality and/or injury of marine mammals, including: (1) time of year/seasonal restrictions; (2) time of day restrictions; (3) use of PSOs to visually observe for North Atlantic right whales; (4) use of PAM to acoustically detect North Atlantic right whales; (5) implementation of clearance zones; (6) use of noise mitigation technology; and, (7) post-detonation monitoring visual and acoustic monitoring by PSOs and PAM operators.

Due to mitigation measures that are required to be implemented during any UXO/MEC detonations, the likelihood of Level A harassment and some Level B harassment for some species was reduced. However, there is still potential for Level A harassment for some species, such as for harbor porpoises and both harbor and gray seals.

HRG Surveys

NMFS considers the data provided by Crocker and Fratantonio (2016) to represent the best available information on source levels associated with HRG

equipment and, therefore, recommends that source levels provided by Crocker and Fratantonio (2016) be incorporated in the method described above to estimate ranges to the Level A harassment and Level B harassment isopleths. In cases when the source level for a specific type of HRG equipment is not provided in Crocker and Fratantonio (2016), NMFS recommends that either the source levels provided by the manufacturer be used, or, in instances where source levels provided by the manufacturer are unavailable or unreliable, a proxy from Crocker and Fratantonio (2016) be used instead. Ocean Wind utilized the following criteria for selecting the appropriate inputs into the NMFS User Spreadsheet Tool (NMFS, 2018):

(1) For equipment that was measured in Crocker and Fratantonio (2016), the reported source level (SL) for the most likely operational parameters was selected.

(2) For equipment not measured in Crocker and Fratantonio (2016), the best available manufacturer specifications were selected. Use of manufacturer specifications represent the absolute maximum output of any source and do not adequately represent the operational source. Therefore, they should be considered an overestimate of the sound propagation range for that equipment.

(3) For equipment that was not measured in Crocker and Fratantonio

(2016) and did not have sufficient manufacturer information, the closest proxy source measured in Crocker and Fratantonio (2016) was used.

The Dura-spark measurements and specifications provided in Crocker and Fratantonio (2016) were used for all sparker systems proposed for the HRG surveys. These included variants of the Dura-spark sparker system and various configurations of the GeoMarine Geo-Source sparker system. The data provided in Crocker and Fratantonio (2016) represent the most applicable data for similar sparker systems with comparable operating methods and settings when manufacturer or other reliable measurements are not available. Crocker and Fratantonio (2016) provide S-Boom measurements using two different power sources (CSP-D700 and CSP-N). The CSP-D700 power source was used in the 700-joules (J) measurements but not in the 1,000-J measurements. The CSP-N source was measured for both 700-J and 1,000-J operations but resulted in a lower source level; therefore, the single maximum source level value was used for both operational levels of the S-Boom.

Table 28 identifies all the representative survey equipment that operates below 180 kHz (*i.e.*, at frequencies that are audible and have the potential to disturb marine mammals) that may be used in support

of planned survey activities, and are likely to be detected by marine mammals given the source level,

frequency, and beamwidth of the equipment. The lowest frequency of the

source was used when calculating the absorption coefficient.

TABLE 28—SUMMARY OF REPRESENTATIVE HRG EQUIPMENT THAT MAY BE USED

Equipment type	Representative HRG equipment	Operating frequency	SL _{rms} (dB re 1 μ Pa m)	SL _{0-pk} (dB re 1 μ Pa m)	Pulse duration (width) (millisecond)	Repetition rate (Hz)	Beamwidth (degrees)	CF = Crocker and Fratantonio (2016) MAN = manufacturer
Non-parametric shallow penetration SPBs (non-impulsive)								
Sub-bottom Profiler.	ET 216 (2000DS or 3200 top unit)	2–16	195	-	20	6	24	MAN
		2–8						
	ET 424	4–24	176	-	3.4	2	71	CF
	ET 512	0.7–12	179	-	9	8	80	CF
	GeoPulse 5430A	2–17	196	-	50	10	55	MAN
	Teledyne Benthos Chirp III—TTV 170.	7–2	197	-	60	15	100	MAN
Medium penetration SBPs (impulsive)								
Sparker	AA, Dura-spark (400 tips, 500J) ^a	0.3–1.2	203	211	1.1	4	Omni	CF
	AA, triple plate S-Boom (700–1,000J) ^b	0.1–5	205	211	0.6	4	80	CF

- = not applicable; ET = EdgeTech; J = joule; kHz = kilohertz; dB = decibels; SL = source level; UHD = ultra-high definition; AA = Applied Acoustics; rms = root-mean square; μ Pa = microPascal; re = referenced to; SPL = sound pressure level; PK = zero-to-peak pressure level; Omni = omnidirectional source.

Notes: All source information that was used to calculate threshold isopleths are provided in Table 1.

^aThe Dura-spark measurements and specifications provided in Crocker and Fratantonio (2016) were used for all sparker systems proposed for the survey. These include variants of the Dura-spark sparker system and various configurations of the GeoMarine Geo-Source sparker system. The data provided in Crocker and Fratantonio (2016) represent the most applicable data for similar sparker systems with comparable operating methods and settings when manufacturer or other reliable measurements are not available.

^bCrocker and Fratantonio (2016) provide S-Boom measurements using two different power sources (CSP–D700 and CSP–N). The CSP–D700 power source was used in the 700–J measurements but not in the 1,000–J measurements. The CSP–N source was measured for both 700–J and 1,000–J operations but resulted in a lower SL; therefore, the single maximum SL value was used for both operational levels of the S-Boom.

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimation of Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling

methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For mobile sources (such as the active acoustic sources proposed for use during Ocean Wind's HRG surveys), the User Spreadsheet predicts the closest distance at which a stationary animal would not incur PTS if the sound source traveled by the animal in a straight line at a constant speed. JASCO modeled distances to Level A harassment isopleths for all types of HRG equipment and all marine mammal functional hearing groups using the NMFS User Spreadsheet and NMFS Technical Guidance (2018).

For HRG surveys, in order to better consider the narrower and directional beams of the sources, NMFS has

developed an additional tool for determining the sound pressure level (SPL_{rms}) at the 160-dB isopleth for the purposes of estimating the extent of Level B harassment isopleths associated with HRG survey equipment (NMFS, 2020). This methodology incorporates frequency-dependent absorption and some directionality to refine estimated ensonified zones. Ocean Wind used NMFS' methodology with additional modifications to incorporate a seawater absorption formula and account for energy emitted outside of the primary beam of the source. For sources that operate with different beam widths, the maximum beam width was used (see Table 29). The lowest frequency of the source was used when calculating the absorption coefficient.

TABLE 29—DISTANCE TO WEIGHTED LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS FOR EACH HRG SOUND SOURCE OR COMPARABLE SOUND SOURCE CATEGORY FOR EACH MARINE MAMMAL HEARING GROUP

Equipment type	HRG sources	Distance to Level A harassment threshold (m)					Distance to Level B harassment threshold (m)
		Low-frequency cetaceans (SEL _{CUM})	Mid-frequency cetaceans (SEL _{CUM})	High-frequency cetaceans (SEL _{CUM})	High-frequency cetaceans (SPL _{0-PK})	Phocids (SEL _{CUM})	
							All (SPL _{rms})
Non-impulsive, non-parametric, shallow SBP (CHIRPs)							
Sub-bottom Profilers (SBP; Compressed High Intensity Radiated Pulse (CHIRPs)).	EdgeTech 216	<1	<1	2.9	n/a	0	9
	EdgeTech 424	0	0	0	n/a	0	4
	EdgeTech 512i	0	0	<1	n/a	0	6
	GeoPulse 5430	<1	<1	36.5	n/a	<1	21

TABLE 29—DISTANCE TO WEIGHTED LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS FOR EACH HRG SOUND SOURCE OR COMPARABLE SOUND SOURCE CATEGORY FOR EACH MARINE MAMMAL HEARING GROUP—Continued

Equipment type	HRG sources	Distance to Level A harassment threshold (m)					Distance to Level B harassment threshold (m)
		Low-frequency cetaceans (SEL _{CUM})	Mid-frequency cetaceans (SEL _{CUM})	High-frequency cetaceans (SEL _{CUM})	High-frequency cetaceans (SPL _{0-PK})	Phocids (SEL _{CUM})	
	Teledyn Benthos Chirp III—TTV 170.	1.5	<1	16.9	n/a	<1	48
Impulsive, medium SBP (Boomers and Sparkers)							
Boomer	AA Triple plate S-Boom (700/1,000 J).	<1	0	0	4.7	<1	34
Sparker	AA Dura-spark UHD (500 J/400 tip).	<1	0	0	2.8	<1	141
	AA Dura-spark UHD 400+400.	<1	0	0	2.8	<1	141
	GeoMarine Geo-Source dual 400 tip sparker.	<1	0	0	2.8	<1	141

Potential exposures of marine mammals to acoustic impacts from HRG survey activities were estimated by assuming an active survey distance of 70 km per 24-hour period. This assumes the vessel would be traveling at a speed of 4 kn and only during periods where

active acoustics were being used with frequency ranges less than 180 kHz. A vessel that would only operate during daylight hours is assumed to have an active survey distance of 35 km.

To maintain a potential for 24-hour HRG surveys, the corresponding Level A

harassment and Level B harassment areas were calculated for each source based on the threshold distances, assuming a 70-km operational period (Table 30).

TABLE 30—CALCULATED AREAS (DISTANCES IN PARENTHESIS) ENCOMPASSING THE LEVEL A HARASSMENT AND LEVEL B HARASSMENT THRESHOLDS ^a FOR REPRESENTATIVE ACOUSTIC SOURCE

Acoustic source	Level A harassment isopleth area (in km ²) and distance (m) ^b				Level B Harassment isopleth area (in km ²) and distance (m) ^c
	Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocids	All Marine mammal hearing groups
Non-impulsive, non-parametric, shallow SBP (CHIRPs)					
ET 216 CHIRP	0 (<1)	0 (<1)	0.4 (2.9)	0 (0)	1.3 (9)
ET 424 CHIRP	0 (0)	0 (0)	0 (0)	0 (0)	0.6 (4)
ET 512i CHIRP	0 (0)	0 (0)	0 (<1)	0 (<1)	0.8 (21)
GeoPulse 5430	0 (<1)	0.1 (<1)	5.1 (36.5)	0 (<1)	2.9 (21)
TB CHIRP III	0.2 (1.5)	0 (<1)	2.4 (16.9)	0.1 (<1)	6.7 (48)
Impulsive, medium SBP (Boomers and Sparkers)					
AA Triple plate S-Boom (700–1,000 J)	0.1 (<1)	0 (0)	0.7 (0)	0 (SEL _{CUM} : 0; SPL _{0-PK} : 4.7)	4.8 (34)
AA, Dura-spark UHD	0.1 (<1)	0 (0)	0.4 (0)	0 (SEL _{CUM} : 0; SPL _{0-PK} : 2.8)	19.8 (141)

^a The Level A harassment and B harassment isopleths were calculated to comprehensively assess the potential impacts of the predicted source operations as required for the ITA application (Ocean Wind, 2022b). As described in the ITA application, minimal Level A harassment takes are expected and were included.

^b Based on maximum distances in Table 1–30 of the ITA application (Ocean Wind, 2022b). For consistency, the metric producing the largest distance to the Level A harassment thresholds (either cumulative sound exposure level or zero to peak sound pressure level) was used to calculate the areas for each hearing group.

^c Based on maximum distances in Table 1–30 of the ITA application calculated for Level B harassment root-mean-square sound pressure level thresholds (Ocean Wind, 2022b).

Results of modeling using the methodology described above indicated that, of the HRG survey equipment planned for use by Ocean Wind that has the potential to result in Level B harassment of marine mammals, sound produced by the Applied Acoustics Dura-spark UHD sparkers and GeoMarine Geo-Source sparker would

propagate furthest to the Level B harassment threshold (141 m; Table 30). For the purposes of the exposure analysis, it was conservatively assumed that sparkers would be the dominant acoustic source for all survey days. Thus, the distances to the isopleths corresponding to the threshold for Level B harassment for sparkers (141 m) was

used as the basis of the take calculation for all marine mammals.

The modeled distances to isopleths corresponding to the Level A harassment threshold were very small (<1 m (<3.3 ft)) for three of the four marine mammal functional hearing groups that may be impacted by the planned activities (*i.e.*, low frequency

and mid frequency cetaceans, and phocids). The largest distance to the Level A harassment isopleth is 36.5 m (119.8 ft), associated with use of the GeoPulse 5430A. Because this distance is small, coupled with the characteristics of sounds produced by HRG equipment in general (including the GeoPulse 5430A), neither NMFS nor Ocean Wind anticipates Level A

harassment during HRG surveys, even absent mitigation.

The estimated exposures were calculated using the average density for the 12 months for each marine mammal species, or the annual density when only one value was available. These densities were multiplied by the number of annual survey days (Years 1, 4, 5 = 88 days; Years 2, 3 = 180 days) and then by the area ensonified per day (70 km multiplied by the areas found in

Table 30). This approach was taken because Ocean Wind does not know which months HRG surveys would occur in. This approach produced a conservative estimate of exposures and, subsequently, take for each species.

Based on the analysis above, the modeled Level A harassment and B harassment exposures of marine mammals resulting from HRG survey activities are shown in Table 31.

TABLE 31—CALCULATED ANNUAL MAXIMUM LEVEL A HARASSMENT AND B HARASSMENT EXPOSURES OF MARINE MAMMALS RESULTING FROM ANNUAL DAYS OF HRG SURVEYS

Marine mammal species	Population estimate	Estimated Level A harassment exposures ^b		Estimated Level B harassment exposures	
		Years 1, 4, and 5 (88 days)	Years 2 and 3 (180 days)	Years 1, 4, and 5 (88 days)	Years 2 and 3 (180 days)
North Atlantic right whale ^a	338	<0.01	0.01	0.46	0.94
Blue whale ^a	Unknown	<0.01	<0.01	0.02	0.03
Fin whale ^a	6,802	0.01	0.02	1.24	2.56
Humpback whale	1,396	0.01	0.02	1.10	2.27
Minke whale	21,968	0.02	0.04	2.40	4.98
Sei whale ^a	6,292	<0.01	<0.01	0.33	0.68
Sperm whale ^a	4,349	<0.01	<0.01	0.04	0.09
Atlantic spotted dolphin	39,921	n/a	n/a	n/a	n/a
Atlantic white-sided dolphin	93,233	0.03	0.05	4.79	10.04
Bottlenose dolphin (offshore stock)	62,851	1.23	2.46	173.84	348.37
Bottlenose dolphin (coastal stock)	6,639	3.28	6.60	464.18	933.46
Common dolphin	172,974	0.20	0.42	28.38	59.52
Long-finned pilot whales	28,924	<0.01	<0.01	0.19	0.40
Short-finned pilot whales	39,215	<0.01	<0.01	0.14	0.29
Risso's dolphin	35,215	<0.01	<0.01	0.31	0.65
Harbor porpoise	95,543	5.60	11.59	21.69	44.88
Gray seal	27,300	0.23	0.48	33.23	67.56
Harbor seal	61,336	0.66	1.34	92.88	188.83

^a Listed as Endangered under the Endangered Species Act (ESA).

^b Some Level A harassment exposures were estimated to occur during HRG surveys, but due to the required mitigation measures Ocean Wind would be required to undertake, no Level A harassment takes has been authorized.

NMFS reiterates that authorized takes will be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use and due to the small PTS zones associated with HRG equipment types planned for use, Level A harassment is neither anticipated (even absent mitigation), nor authorized. Consideration of the anticipated effectiveness of the measures (*i.e.*, exclusion zones and shutdown measures), discussed in detail below in the Mitigation section, further strengthens the conclusion that Level A harassment is not a reasonably

anticipated outcome of the survey activity. Ocean Wind did not request authorization of take by Level A harassment, and no take by Level A harassment is authorized by NMFS. As described previously, no serious injury or mortality is anticipated or authorized for this activity.

The authorized take estimates presented here assumed that HRG surveys would be occurring for 24 hours each day. Adjustments based on the mean group size estimates (*i.e.*, increasing take to the mean group size if the calculated exposures were fewer) were included for the following species: sei whales (Kenney and Vigness-Raposa, 2010), minke whales (Kenney and Vigness-Raposa, 2010), humpback whales (CeTAP, 1982), sperm whales

(Barkaszi and Kelly, 2019), Atlantic spotted dolphins (Kenney and Vigness-Raposa, 2010), both species of pilot whales (Kenney and Vigness-Raposa, 2010), and Risso's dolphins (Barkaszi and Kelly, 2019).

Years 1, 4, and 5 in Table 32 below represent HRG surveys occurring during the pre- and post-construction phases of the Project. Each of these years is based on an annual HRG survey effort of 88 days (264 total effort over 3 years). Years 2 and 3 would include HRG surveys occurring during the construction of other elements of the Project. Each of these years is based on an annual HRG survey effort of 180 days (360 days total over 2 years).

TABLE 32—ANNUAL AUTHORIZED LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKE RESULTING FROM HIGH-RESOLUTION (HRG) SITE CHARACTERIZATION SURVEYS OVER 5 YEARS

Marine mammal species	Population estimate	Pre- and post-construction phases (years 1, 4, 5; 88 days annually)		During construction phase (years 2 and 3; 180 days annually)	
		Authorized Level B harassment	Authorized Level A harassment	Authorized Level A harassment	Authorized Level B harassment
North Atlantic right whale ^a	338	0	^d 1	0	^d 2
Blue whale ^a	Unknown	0	0	0	0
Fin whale ^a	6,802	0	2	0	3
Humpback whale	1,396	0	^b 2	0	^b 3
Minke whale	21,968	0	^b 3	0	^b 5
Sei whale ^a	6,292	0	^b 0	0	^b 1
Sperm whale ^a	4,349	0	^b 3	0	^b 3
Atlantic spotted dolphin	39,921	0	^b 45	0	^b 45
Atlantic white-sided dolphin	93,233	0	5	0	11
Bottlenose dolphin (offshore stock)	62,851	^c 0	173	^c 0	349
Bottlenose dolphin (coastal stock)	6,639	^c 0	465	^c 0	934
Common dolphin	172,974	0	29	0	60
Long-finned pilot whale	39,215	0	^b 10	0	^b 10
Short-finned pilot whale	28,924	0	^b 10	0	^b 10
Risso's dolphin	35,215	0	^b 30	0	^b 30
Harbor porpoise	95,543	^c 0	22	^c 0	45
Gray seal	27,300	^c 0	34	^c 0	68
Harbor seal	61,336	^c 0	93	^c 0	189

^a Listed as Endangered under the Endangered Species Act (ESA).

^b The following species' requested take was a adjusted based on mean group size: Sei whale (Kenney and Vigness-Raposa, 2010), minke whale (Kenney and Vigness-Raposa, 2010), humpback whale (CeTAP, 1982), sperm whale (Barkaszi and Kelly, 2019), Atlantic spotted dolphin (Kenney and Vigness-Raposa, 2010), both species of pilot whale (Kenney and Vigness-Raposa, 2010), and Risso's dolphin (Barkaszi and Kelly, 2019).

^c A small amount of Level A harassment exposures were estimated based on the density calculations, but no Level A harassment take was requested by Ocean Wind or authorized by NMFS due to the mitigation measures planned for use.

^d Based on the exposure estimates, values greater than 0.5 for all other species besides North Atlantic right whale were rounded up to one. Take estimates for North Atlantic right whales from 0.45 and up were rounded up to one (to be conservative) and 0.93 was rounded to two.

Total Authorized Takes Across All Activity Types

NMFS is authorizing take by Level A harassment and Level B harassment incidental to all Project activities combined (*i.e.*, impact pile driving to install WTG and OSS monopile/pin pile foundations (assuming 10 dB of sound attenuation), vibratory pile driving to install and remove temporary cofferdams and goal posts, UXO/MEC detonations (assuming 10 dB of sound attenuation), and HRG surveys) as shown in Table 33. The annual amount of take that would occur in each year based on Ocean Wind's current schedules is provided in Table 34. The Year 1 take estimates include 88 days of HRG surveys, cofferdams and goal posts installation and removal, and mitigated UXO/MEC detonations. Year 2 includes 180 days of HRG surveys, WTG impact installation using monopile foundations, and OSS impact installation using pin piles for jacket foundations (noting that Ocean Wind will actually build out monopiles for OSS instead). Year 3 includes 180 days of HRG surveys only. And Years 4 and 5 include 88 days of HRG surveys. Although temporary cofferdam and goal

post installation and removal could occur in Year 2, all of the authorized takes were allocated to Year 1 as this represents the most accurate construction scenario. All impact pile driving activities for the WTGs and OSSs could also occur outside of Year 2; however, all of the takes were allocated to Year 2 as this represents the most likely scenario.

The amount of take that NMFS authorized is considered conservative for several reasons. The authorized take numbers assume all piles are installed during 30 days of the highest density month and 19 days (38 piles) of the second-highest density month for each species from May to December. The authorized take numbers for Level A harassment do not fully account for the likelihood that marine mammals would avoid a stimulus when possible before the individual accumulates enough acoustic energy to potentially cause auditory injury; nor do these numbers fully account for the effectiveness of the required mitigation measures, with the exception for foundation installation and UXO/MEC detonations, which accounted for 10 dB of sound attenuation. Finally, while Ocean Wind may use monopiles for OSS

foundations, NMFS has used the pin pile take estimates in the total take authorized. The exposure estimates for pin piles is greater for all species than the exposures estimated for monopiles installation.

If Ocean Wind decides to use suction-buckets or gravity-based foundations to install bottom-frame WTG and OSS foundations, take would not occur as noise levels would not be elevated to the degree there is a potential for take (*i.e.*, no pile driving is involved with installing suction buckets or gravity-based foundations). The authorized take from vibratory pile driving assumed temporary cofferdams using sheet piles would be installed, versus the alternative installation of a gravity-cell cofferdam, for which no take would be expected nor authorized.

NMFS also presents the percentage of each marine mammal stock estimated to be taken based on the total amount of annual take, which is presented in Table 35. Table 34 provides the total authorized take from the entire 5-year effective period of the rulemaking and issued LOA. NMFS recognizes that schedules may shift due to a number of planning and logistical constraints such that take may be redistributed

throughout the 5 years. However, the 5-year total amount of take for each species, shown in Table 33, and the maximum amount of take in any 1 year (Table 35) would not be exceeded.

Additionally, to reduce impacts to marine mammals, NMFS has required several mitigation and monitoring measures, discussed in the Mitigation and Monitoring and Reporting sections,

which are activity-specific and are designed to minimize acoustic exposures to marine mammal species.

TABLE 33—LEVEL A HARASSMENT AND LEVEL B HARASSMENT TAKES FOR ALL ACTIVITIES AUTHORIZED DURING THE CONSTRUCTION OF THE OCEAN WIND 1 PROJECT

Marine mammal species	Population estimate	2024—(Year 1)		2025—(Year 2)		2026—(Year 3)		2027—(Year 4)		2028—(Year 5)	
		Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment
North Atlantic right whale ^a	338	0	3	0	7	0	2	0	1	0	1
Blue whale ^a	Unknown ^b	0	0	0	4	0	0	0	0	0	0
Fin whale ^a	6,802	0	6	4	13	0	3	0	2	0	2
Humpback whale	1,396	0	8	^e 7	^e 66	0	3	0	2	0	2
Minke whale	21,968	^e 2	32	22	74	0	5	0	3	0	3
Sei whale ^a	6,292	0	2	1	3	0	1	0	0	0	0
Sperm whale ^a	4,349	0	6	0	^d 9	0	3	0	3	0	3
Atlantic spotted dolphin	39,921	0	135	0	135	0	45	0	45	0	45
Atlantic white-sided dolphin	93,233	0	^e 19	0	100	0	11	0	5	0	5
Common dolphin	172,974	0	^e 64	0	1,584	0	60	0	29	0	29
Bottlenose dolphin (offshore stock)	62,851	^e 11	561	0	^f 1,360	0	349	0	174	0	174
Bottlenose dolphin (coastal stock) ^c	6,639	^e 22	1,394	0	^f 1,028	0	934	0	465	0	465
Short-finned pilot whale	39,215	0	30	0	30	0	10	0	10	0	10
Long-finned pilot whale	28,924	0	30	0	30	0	10	0	10	0	10
Risso's dolphin	35,215	0	90	0	90	0	30	0	30	0	30
Harbor porpoise	95,543	10	90	69	350	0	45	0	22	0	22
Gray seal	27,300	31	173	4	305	0	68	0	68	0	34
Harbor seal	61,336	35	482	13	844	0	189	0	93	0	93

^a Listed as Endangered under the Endangered Species Act (ESA).

^b The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^c The estimate for coastal bottlenose dolphins (bayside versus Atlantic Ocean-facing) is likely an overestimate as this stock has demonstrated a preference for coastal environments as opposed to estuarine (Toth et al., 2011).

^d NMFS corrects a mathematical error for sperm whales where the value presented in this table was incorrectly labeled as six rather than nine for Year 2.

^e Corrections based on group size data were made for some species, based on comments received from the Marine Mammal Commission and/or using AMAPPS/Ocean Wind's group size data, which increased some of the take when compared to the proposed rule.

^f Based on a comment provided by the Commission, NMFS, in consultation with JASCO and Ocean Wind, have opted to allocate 10 percent of the authorized take by Level B harassment of the offshore stock of bottlenose dolphins to the coastal stock during WTG installation. No takes of Level A harassment has been authorized for either of these stocks.

TABLE 34—TOTAL 5-YEAR AUTHORIZED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES DURING THE CONSTRUCTION OF THE OCEAN WIND 1 PROJECT

Marine mammal species	Population size	5-Year Project Duration ^b		
		Level A harassment	Level B harassment	Total 5-year
North Atlantic right whale ^a	338	0	14	14
Blue whale ^a	Unknown ^c	0	4	4
Fin whale ^a	6,802	4	26	30
Humpback whale	1,396	^f 7	^f 81	88 ^f
Minke whale	21,968	^f 24	117	^f 141
Sei whale ^a	6,292	1	6	7
Sperm whale ^a	4,349	0	^e 24	^e 24
Atlantic spotted dolphin	39,921	0	405	405
Atlantic white-sided dolphin	93,233	0	^f 140	^f 140
Bottlenose dolphin (offshore stock)	62,851	^f 11	^g 2,618	^g 2,629
Bottlenose dolphin (coastal stock)	6,639	^f 22	^g 4,286	^{d f g} 4,308
Common dolphin	172,974	0	^f 1,766	^f 1,766
Long-finned pilot whale	39,215	0	90	90
Short-finned pilot whale	28,924	0	90	90
Risso's dolphin	35,215	0	270	270
Harbor porpoise	95,543	79	529	608
Gray seal	27,300	35	614	649
Harbor seal	61,336	48	1,701	1,749

^a Listed as Endangered under the Endangered Species Act (ESA).

^b Activities include impact pile driving of WTG and OSS foundations (assuming mitigated by 10 dB), vibratory pile driving for the installation/removal of temporary cofferdam and goal posts, HRG surveys (year-round with variable levels of effort), and up to 10 high-order UXO/MEC detonations (assuming mitigated by 10 dB).

^c The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^d The estimate for coastal bottlenose dolphins (bayside versus Atlantic Ocean-facing) is likely an overestimate as this stock has demonstrated a preference for coastal environments as opposed to estuarine (Toth et al., 2011).

^e NMFS corrects a mathematical error for sperm whales where the value presented in this table based on changes from Table 33.

^f Corrections based on group size data were made for some species, based on comments received from the Marine Mammal Commission and/or using AMAPPS/Ocean Wind's group size data, which increased some of the take when compared to the proposed rule.

^g Based on a comment provided by the Commission, NMFS, in consultation with JASCO and Ocean Wind, have opted to allocate 10 percent of the authorized take by Level B harassment of the offshore stock of bottlenose dolphins to the coastal stock during WTG installation. No takes of Level A harassment has been authorized for either of these stocks.

In making the negligible impact determination and the necessary small numbers finding, NMFS assesses the greatest number of takes of marine mammals that could occur within any one year, which in the case of this rule is based on the predicted Year 2 for all species, except the coastal stock of bottlenose dolphins, which used the

calculated Level A harassment from Year 1 with the calculated Level B harassment from Year 2. In this calculation, the maximum estimated number of Level A harassment takes in any one year is summed with the maximum estimated number of Level B harassment takes in any one year for each species to yield the highest number

of estimated take that could occur in any year. We recognize that certain activities could shift within the 5-year effective period of the rule; however, the rule allows for that flexibility and the takes are not expected to exceed those shown in Table 35 in any year.

TABLE 35—MAXIMUM NUMBER OF AUTHORIZED TAKES (LEVEL A HARASSMENT AND LEVEL B HARASSMENT) THAT COULD OCCUR IN ANY ONE YEAR OF THE PROJECT AND THE TOTAL PERCENT STOCK THAT WOULD BE TAKEN BASED ON THE MAXIMUM ANNUAL AUTHORIZED TAKE

Marine mammal species	Population size	Max Level A harassment	Max Level B harassment	Max annual take (Max level A harassment + Max Level B harassment)	Total percent stock taken based on maximum annual take ^b
North Atlantic right whale ^a	338	0	7	7	2.1
Blue whale ^a	Unknown ^c	0	4	4	0.97
Fin whale ^a	6,802	4	13	17	0.25
Humpback whale	1,396	^f 8	^f 66	^f 74	^f 5.3
Minke whale	21,968	22	74	96	0.44
Sei whale ^a	6,292	1	3	4	0.06
Sperm whale ^a	4,349	0	^e 9	^e 9	^e 0.21
Atlantic spotted dolphin	39,921	0	135	135	0.34
Atlantic white-sided dolphin	93,233	0	100	100	0.11
Bottlenose dolphin (offshore stock)	62,851	^f 11	^g 1,360	^g ^f 1,3671	^g ^f 2.17
Bottlenose dolphin (coastal stock)	6,639	^f 22	1,394	^f 1,416	^d ^f 21.3
Common dolphin	172,974	0	1,584	1,584	0.92
Long-finned pilot whale	39,215	0	30	30	0.08
Short-finned pilot whale	28,924	0	30	30	0.10
Risso's dolphin	35,215	0	90	90	0.26
Harbor porpoise	95,543	69	350	419	0.44
Gray seal	27,300	31	305	336	1.23
Harbor seal	61,336	35	844	879	1.43

^a Listed as Endangered under the Endangered Species Act (ESA).

^b Calculations of percentage of stock taken are based on the maximum authorized Level A harassment take in any one year + the maximum authorized Level B harassment take in any one year and then compared against the best available abundance estimate as shown in Table 35. For this final rule, the best available abundance estimates are derived from the NMFS final 2022 Stock Assessment Reports.

^c The minimum blue whale population is estimated at 412, although the exact value is not known. NMFS is utilizing this value for our small numbers determination, as shown in parenthesis.

^d The estimate for coastal bottlenose dolphins (bayside versus Atlantic Ocean-facing) is likely an overestimate as this stock has demonstrated a preference for coastal environments as opposed to estuarine (Toth et al., 2011).

^e NMFS corrects a mathematical error for sperm whales in Table 33 where the value presented in this table has been updated from six to nine.

^f Corrections based on group size data were made for some species, based on comments received from the Marine Mammal Commission and/or using AMAPPS group size data, which increased some of the take when compared to the proposed rule.

^g Based on a comment provided by the Commission, NMFS, in consultation with JASCO and Ocean Wind, have opted to allocate 10 percent of the authorized take by Level B harassment of the offshore stock of bottlenose dolphins to the coastal stock during WTG installation. No takes of Level A harassment has been authorized for either of these stocks.

Mitigation

As noted in the Changes From the Proposed to Final Rule section, NMFS has added several new mitigation requirements and clarified a few others, has increased the winter clearance zones for large whales and harbor porpoises, and has removed the PAM clearance zone and PAM shutdown zone for North Atlantic right whales and added a single PAM monitoring zone (10 km) for all species (see Table 36) for

clarity and to be consistent with the regulatory text in the proposed rule and in this final rule. Additionally, NMFS has clarified that the shutdown and clearance zones in Table 36 apply to both visual and auditory detection, and these changes are described in detail in the sections below. Other than the changes described, the required measures remain the same as those described in the proposed rule. However, NMFS has also re-organized

and simplified the section to avoid full duplication of the specific requirements that are fully described in the regulatory text.

In order to promulgate a rulemaking under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to

rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS' regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and,

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation strategies described below are consistent with those required and successfully implemented under previous incidental take authorizations issued in association with in-water construction activities (e.g., soft-start, establishing shutdown zones). Additional measures have also been incorporated to account for the fact that the proposed construction activities would occur offshore. Modeling was performed to estimate harassment zones, which were used to inform mitigation measures for the project's activities to minimize Level A harassment and Level B harassment to the extent practicable, while providing estimates of the areas within which Level B harassment might occur.

Generally speaking, the mitigation measures considered and required here fall into three categories: temporal

(seasonal and daily) work restrictions, real-time measures (shutdown, clearance, and vessel strike avoidance), and noise attenuation/reduction measures. Seasonal work restrictions are designed to avoid or minimize operations when marine mammals are concentrated or engaged in behaviors that make them more susceptible or make impacts more likely, in order to reduce both the number and severity of potential takes, and are effective in reducing both chronic (longer-term) and acute effects. Real-time measures, such as implementation of shutdown and clearance zones, as well as vessel strike avoidance measures, are intended to reduce the probability or severity of harassment by taking steps in real time once a higher-risk scenario is identified (e.g., once animals are detected within an impact zone). Noise attenuation measures, such as bubble curtains, are intended to reduce the noise at the source, which reduces both acute impacts, as well as the contribution to aggregate and cumulative noise that may result in longer-term chronic impacts.

Below, we briefly describe the required training, coordination, and vessel strike avoidance measures that apply to all activity types, and then in the following subsections we describe the measures that apply specifically to foundation installation, nearshore installation and removal activities for cable laying, HRG surveys, and UXO/MEC detonation. Details on specific requirements can be found in Part 217—Regulations Governing The Taking And Importing Of Marine Mammals at the end of this rulemaking.

Training and Coordination

NMFS requires all Ocean Wind employees and contractors conducting activities on the water, including, but not limited to, all vessel captains and crew are trained in marine mammal detection and identification, communication protocols, and all required measures to minimize impacts on marine mammals and support Ocean Wind's compliance with the LOA, if issued. Additionally, all relevant personnel and the marine mammal species monitoring team(s) are required to participate in joint, onboard briefings prior to the beginning of project activities. The briefing must be repeated whenever new relevant personnel (e.g., new PSOs, construction contractors, relevant crew) join the project before work commences. During this training, Ocean Wind is required to instruct all project personnel regarding the authority of the marine mammal monitoring team(s). For example, the HRG acoustic equipment operator, pile

driving personnel, etc., is required to immediately comply with any call for a delay or shut down by the Lead PSO. Any disagreement between the Lead PSO and the project personnel must only be discussed after delay or shutdown has occurred. In particular, all captains and vessel crew must be trained in marine mammal detection and vessel strike avoidance measures to ensure marine mammals are not struck by any project or project-related vessel.

Prior to the start of in-water construction activities, vessel operators and crews would receive training about marine mammals and other protected species known or with the potential to occur in the Project Area, making observations in all weather conditions, and vessel strike avoidance measures. In addition, training would include information and resources available regarding applicable Federal laws and regulations for protected species. Ocean Wind will provide documentation of training to NMFS.

North Atlantic Right Whale Awareness Monitoring

Ocean Wind must use available sources of information on North Atlantic right whale presence, including daily monitoring of the Right Whale Sightings Advisory System, monitoring of U.S. Coast Guard very high frequency (VHF) Channel 16 throughout each day to receive notifications of any sightings, and information associated with any regulatory management actions (e.g., establishment of a zone identifying the need to reduce vessel speeds). Maintaining daily awareness and coordination affords increased protection of North Atlantic right whales by understanding North Atlantic right whale presence in the area through ongoing visual and passive acoustic monitoring efforts and opportunities (outside of Ocean Wind's efforts), and allows for planning of construction activities, when practicable, to minimize potential impacts on North Atlantic right whales.

Vessel Strike Avoidance Measures

This final rule contains numerous vessel strike avoidance measures that reduce the risk that a vessel and marine mammal could collide. While the likelihood of a vessel strike is generally low, they are one of the most common ways that marine mammals are seriously injured or killed by human activities. Therefore, enhanced mitigation and monitoring measures are required to avoid vessel strikes to the extent practicable. While many of these measures are proactive intending to avoid the heavy use of vessels during

times when marine mammals of particular concern may be in the area, several are reactive and occur when a project personnel sights a marine mammal. The mitigation requirements are described generally here and in detail in the regulation text at the end of this final rule (see 50 CFR 217.264(b)). Ocean Wind will be required to comply with these measures except under circumstances when doing so would create an imminent and serious threat to a person or vessel or to the extent that a vessel is unable to maneuver and because of the inability to maneuver, the vessel cannot comply.

While underway, Ocean Wind is required to monitor for and maintain a minimum separation distance from marine mammals and operate vessels in a manner that reduces the potential for vessel strike. Regardless of the vessel's size, all vessel operators, crews, and dedicated visual observers (*i.e.*, PSO or trained crew member) must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course (as appropriate) to avoid striking any marine mammal. The dedicated visual observer, equipped with suitable monitoring technology (*e.g.*, binoculars, night vision devices), must be located at an appropriate vantage point for ensuring vessels are maintaining required vessel separation distances from marine mammals (*e.g.*, 500 m from North Atlantic right whales).

All project vessels, regardless of size, must maintain the following minimum separation zones: 500 m from North Atlantic right whales; 100 m from sperm whales and non-North Atlantic right whale baleen whales; and 50 m from all delphinid cetaceans and pinnipeds (an exception is made for those species that approach the vessel (*i.e.*, bow-riding dolphins)). If any of these species are sighted within their respective minimum separation zone, the underway vessel must shift its engine to neutral and the engines must not be engaged until the animal(s) have been observed to be outside of the vessel's path and beyond the respective minimum separation zone. If a North Atlantic right whale is observed at any distance by any project personnel or acoustically detected, project vessels must reduce speeds to 10 kn. Additionally, in the event that any project-related vessel, regardless of size, observes any large whale (other than a North Atlantic right whale) within 500 m of an underway vessel, the vessel is required to immediately reduce speeds to 10 kn or less. The 10 kn speed restriction will remain in effect as outlined in 50 CFR 217.264(b).

All of the project-related vessels are required to comply with existing NMFS vessel speed restrictions for North Atlantic right whales and the measures within this rulemaking for operating vessels around North Atlantic right whales and other marine mammals. When NMFS vessel speed restrictions are not in effect and a vessel is traveling at greater than 10 kn, in addition to the required dedicated visual observer, Ocean Wind is required to monitor the crew transfer vessel transit corridor (the path crew transfer vessels take from port to any work area) in real-time with PAM prior to and during transits. To maintain awareness of North Atlantic right whale presence, vessel operators, crew members, and the marine mammal monitoring team would monitor U.S. Coast Guard VHF Channel 16, WhaleAlert, the Right Whale Sighting Advisory System (RWSAS), and the PAM system. Any marine mammal observed by project personnel must be immediately communicated to any on-duty PSOs, PAM operator(s), and all vessel captains. Any North Atlantic right whale or large whale observation or acoustic detection by PSOs or PAM operators must be conveyed to all vessel captains. All vessels would be equipped with an AIS and Ocean Wind must report all Maritime Mobile Service Identify (MMSI) numbers to NMFS Office of Protected Resources prior to initiating in-water activities. Ocean Wind would submit a NMFS-approved North Atlantic Right Whale Vessel Strike Avoidance Plan at least 90 days prior to commencement of vessel use.

Ocean Wind's compliance with these measures will reduce the likelihood of vessel strike to the extent practicable. These measures increase awareness of marine mammals in the vicinity of project vessels and require project vessels to reduce speed when marine mammals are detected (by PSOs, PAM, and/or through another source, *e.g.*, RWSAS) and maintain separation distances when marine mammals are encountered. While visual monitoring is useful, reducing vessel speed is one of the most effective, feasible options available to reduce the likelihood of and effects from a vessel strike. Numerous studies have indicated that slowing the speed of vessels reduces the risk of lethal vessel collisions, particularly in areas where right whales are abundant and vessel traffic is common and otherwise traveling at high speeds (Vanderlaan and Taggart, 2007; Conn and Silber, 2013; Van der Hoop *et al.*, 2014; Martin *et al.*, 2015; Crum *et al.*, 2019).

Seasonal and Daily Restrictions

Temporal restrictions in places where marine mammals are concentrated, engaged in biologically important behaviors, and/or present in sensitive life stages are effective measures for reducing the magnitude and severity of human impacts. The temporal restrictions required here are built around North Atlantic right whale protection. Based upon the best scientific information available (Roberts *et al.*, 2023), the highest densities of North Atlantic right whales in the specified geographic region are expected during the months of January through April with an increase in density starting in December. However, North Atlantic right whales may be present in the specified geographic region throughout the year.

NMFS is requiring seasonal work restrictions to minimize the risk of noise exposure to North Atlantic right whales incidental to certain specified activities to the extent practicable. These seasonal work restrictions are expected to greatly reduce the number of takes of North Atlantic right whales. These seasonal restrictions also afford protection to other marine mammals that are known to use the Project Area with greater frequency during winter months, including other baleen whales.

As described previously, no impact pile driving activities may occur January 1 through April 30. A new measure included in this final rule requires that Ocean Wind install the foundations as quickly as possible and avoid pile driving in December to the maximum extent practicable; however, pile driving may occur in December if it is unavoidable upon approval from NMFS. Ocean Wind has planned to construct the cofferdams and goal posts from October to May within the first year of the effective period of the regulations and LOA, with some potential removal occurring in April or May, if necessary. However, NMFS is not requiring any seasonal restrictions due to the relatively short duration of work and low associated impacts to marine mammals. Although North Atlantic right whales do migrate in coastal waters, they do not typically migrate very close to shore off of New Jersey and/or within New Jersey bays where work would be occurring. Given the distance to the Level B harassment isopleth is conservatively modeled at approximately 10 km, any exposure to vibratory pile driving during cofferdams and goal posts installation would be at levels closer to the 120-dB Level B harassment threshold and not at louder source levels. There is no specific time

of year that UXOs/MECs would be detonated as detonations would be considered on a case-by-case basis. However, Ocean Wind will be restricted from detonating UXO/MECs November 1 through April 30 to reduce impacts to North Atlantic right whales during peak migratory periods. NMFS is not adding seasonal restrictions to HRG surveys; however, Ocean Wind would only perform a predetermined amount of 24-hour survey days within specific years (Years 1, 4, 5 = 88 days; Years 2, 3 = 180 days).

NMFS is also requiring temporal restrictions for some activities. Within any 24-hour period, Ocean Wind would be limited to installing up to 2 monopile foundations. Ocean Wind had requested to initiate pile driving during nighttime when detection of marine mammals is visually challenging. Since the publication of the proposed rule, Ocean Wind has continued conversations with NMFS and BOEM regarding field trials they have been performing to prove the efficacy of their nighttime monitoring methods and systems. These field trials have provided information and evidence that their systems are capable of detecting marine mammals, particularly large whales, at distances necessary to ensure that the required mitigation measures are effective. On April 7, 2023, Ocean Wind submitted an Alternative Monitoring Plan for Nighttime Pile Driving outlining night time monitoring protocols and equipment. Given existing uncertainty with the novelty of the technology, in this final rule, NMFS, in agreement with BOEM, is allowing nighttime pile driving to occur from June 1 through October 31 annually, if the Alternative Monitoring Plan is approved. This period of time has been determined to be acceptable based on the Roberts *et al.* (2023) data demonstrating low North Atlantic right whale densities during these months. Nighttime pile driving outside of this period (*i.e.*, May, November–December) must not occur. From June 1 through to October 31, annually, Ocean Wind will have the ability to initiate impact pile driving at any time (day or night). Subsequent reports submitted by Ocean Wind will allow NMFS to continue to evaluate the efficacy of the technologies and methodologies and to initiate adaptive management approaches, if necessary. We also continue to encourage Ocean Wind to further investigate and test advanced technology detection systems. Any and all vibratory pile driving associated with cofferdams and goal posts installation and removal would only be able to occur during daylight

hours. Any UXO/MEC detonations will be limited to daylight hours only to reduce impacts on migrating species (such as North Atlantic right whales) and to ensure that visual PSOs can confirm appropriate clearance of the site prior to detonation events occurring. Lastly, given the very small Level B harassment zone associated with HRG survey activities and no anticipated or authorized Level A harassment, NMFS is not requiring any daily restrictions for HRG surveys.

More information on activity-specific seasonal and daily restrictions can be found in the regulatory text at the end of this rulemaking.

Noise Abatement Systems

Ocean Wind is required to employ noise abatement systems (NAS), also known as noise attenuation systems, during all foundation installation (*i.e.*, impact pile driving) and UXO/MEC detonation activities to reduce the sound pressure levels that are transmitted through the water in an effort to reduce ranges to acoustic thresholds and minimize, to the extent practicable, any acoustic impacts resulting from these activities. Ocean Wind is required to use at least two NAS to ensure that measured sound levels do not exceed the levels modeled for a 10-dB sound level reduction for foundation installation, which is likely to include a double big bubble curtain combined with another NAS (*e.g.*, hydro-sound damper, or an AdBm Helmholtz resonator), as well as the adjustment of operational protocols to minimize noise levels. For UXO/MEC detonation, a double big bubble curtain must be used and the hoses must be placed at distances to avoid damage to the bubble curtain during detonation. A single bubble curtain, alone or in combination with another NAS device, may not be used for either pile driving or UXO/MEC detonation as received SFV data reveals this approach is unlikely to attenuate sounds to the degree distances to harassment thresholds are at or smaller than those modeled assuming 10-dB of attenuation. Should the research and development phase of newer systems demonstrate effectiveness, as part of adaptive management, Ocean Wind may submit data on the effectiveness of these systems and request approval from NMFS to use them during foundation installation and UXO/MEC detonation activities.

Two categories of NAS exist: primary and secondary. A primary NAS would be used to reduce the level of noise produced by foundation installation activities at the source, typically

through adjustments on to the equipment (*e.g.*, hammer strike parameters). Primary NAS are still evolving and will be considered for use during mitigation efforts when the NAS has been demonstrated as effective in commercial projects. However, as primary NAS are not fully effective at eliminating noise, a secondary NAS would be employed. The secondary NAS is a device or group of devices that would reduce noise as it was transmitted through the water away from the pile, typically through a physical barrier that would reflect or absorb sound waves and therefore, reduce the distance the higher energy sound propagates through the water column. Together, these systems must reduce noise levels to those not exceeding modeled ranges to Level A harassment and Level B harassment isopleths corresponding to those modeled assuming 10-dB sound attenuation, pending results of Sound Field Verification (SFV; see *Sound Field Verification* section below and Part 217—Regulations Governing The Taking And Importing Of Marine Mammals).

Noise abatement systems, such as bubble curtains, are used to decrease the sound levels radiated from a source. Bubbles create a local impedance change that acts as a barrier to sound transmission. The size of the bubbles determines their effective frequency band, with larger bubbles needed for lower frequencies. There are a variety of bubble curtain systems, confined or unconfined bubbles, and some with encapsulated bubbles or panels. Attenuation levels also vary by type of system, frequency band, and location. Small bubble curtains have been measured to reduce sound levels but effective attenuation is highly dependent on depth of water, current, and configuration and operation of the curtain (Austin *et al.*, 2016; Koschinski and Lüdemann, 2013). Bubble curtains vary in terms of the sizes of the bubbles and those with larger bubbles tend to perform a bit better and more reliably, particularly when deployed with two separate rings (Bellmann, 2014; Koschinski and Lüdemann, 2013; Nehls *et al.*, 2016). Encapsulated bubble systems (*i.e.*, Hydro Sound Dampers (HSDs)), can be effective within their targeted frequency ranges (*e.g.*, 100–800 Hz), and when used in conjunction with a bubble curtain appear to create the greatest attenuation. The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and

difficulty in properly installing and operating in-water attenuation devices.

The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices. Dähne *et al.* (2017) found that single bubble curtains that reduce sound levels by 7 to 10 dB reduced the overall sound level by approximately 12 dB when combined as a double bubble curtain for 6-m steel monopiles in the North Sea. During installation of monopiles (consisting of approximately 8-m in diameter) for more than 150 WTGs in comparable water depths (> 25 m) and conditions in Europe indicate that attenuation of 10 dB is readily achieved (Bellmann, 2019; Bellmann *et al.*, 2020) using single BBCs for noise attenuation. When a double big bubble curtain is used (noting a single bubble curtain is not allowed), Ocean Wind is required to maintain numerous operational performance standards. These standards are defined in the regulatory text at the end of this rulemaking, and include, but are not limited to, construction contractors must train personnel in the proper balancing of airflow to the bubble ring and Ocean Wind must submit a performance test and maintenance report to NMFS within 72 hours following the performance test. Corrections to the attenuation device to meet regulatory requirements must occur prior to use during foundation installation activities and UXO/MEC detonation. In addition, a full maintenance check (e.g., manually clearing holes) must occur prior to each pile being installed or any UXO/MEC detonated. If Ocean Wind uses a noise mitigation device in addition to a double big bubble curtain, similar quality control measures are required.

Ocean Wind is required to submit an SFV plan to NMFS for approval at least 180 days prior to installing foundations or detonating UXO/MECs. They are also required to submit interim and final SFV data results to NMFS and make corrections to the noise attenuation systems in the case that any SFV measurements demonstrate noise levels are above those modeled assuming 10 dB. These frequent and immediate reports allow NMFS to better understand the sound fields to which marine mammals are being exposed and require immediate corrective action should they be misaligned with anticipated noise levels within our analysis.

Noise abatement devices are not required during HRG surveys, cofferdam

(sheet pile) installation and removal, and goal post (pipe pile) installation and removal. Regarding cofferdam sheet pile and goal post pipe pile installation and removal, NAS is not practicable to implement due to the physical nature of linear sheet piles and angled pipe piles, and is of low risk for impacts to marine mammals due to the short work duration and lower noise levels produced during the activities. Regarding HRG surveys, NAS cannot practicably be employed around a moving survey ship, but Ocean Wind is required to make efforts to minimize source levels by using the lowest energy settings on equipment that has the potential to result in harassment of marine mammals (e.g., sparkers, boomers) and turn off equipment when not actively surveying. Overall, minimizing the amount and duration of noise in the ocean from any of the project's activities through use of all means necessary (e.g., noise abatement, turning off power) will effect the least practicable adverse impact on marine mammals.

Clearance and Shutdown Zones

NMFS requires the establishment of both clearance and, where technically feasible, shutdown zones during project activities that have the potential to result in harassment of marine mammals. The purpose of "clearance" of a particular zone is to minimize potential instances of auditory injury and more severe behavioral disturbances by delaying the commencement of an activity if marine mammals are near the activity. The purpose of a shutdown is to prevent a specific acute impact, such as auditory injury or severe behavioral disturbance of sensitive species, by halting the activity.

All relevant clearance and shutdown zones during project activities would be monitored by NMFS-approved PSOs and/or PAM operators (as described in the regulatory text at the end of this rulemaking). At least one PAM operator must review data from at least 24 hours prior to foundation installation or any UXO/MEC detonations and must actively monitor hydrophones for 60 minutes prior to commencement of these activities. Any sighting or acoustic detection of a North Atlantic right whale triggers a delay to commencing pile driving and shutdown.

Prior to the start of certain specified activities (foundation installation, cofferdam install and removal, HRG surveys, UXO/MEC detonations), Ocean Wind must ensure designated areas (i.e., clearance zones, Tables 36–39) are clear of marine mammals prior to

commencing activities to minimize the potential for and degree of harassment. For foundation installation and UXO/MEC detonation, PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes, where the zone must be confirmed free of marine mammals at least 30 minutes directly prior to commencing these activities. Clearance zones represent the largest Level A harassment zone for each species group plus 20 percent or a minimum of 100 m (whichever is greater). For foundation installation, the minimum visibility zone would extend 1,650 m from the pile during summer months and 2,500 m during December (Table 36). This value corresponds to the modeled maximum ER_{95%} distances to the Level A harassment threshold for low-frequency cetaceans, assuming 10 dB of attenuation.

For cofferdam and goal post pile driving and HRG surveys, monitoring must be conducted for 30 minutes prior to initiating activities and the clearance zones must be free of marine mammals during that time.

For any other in-water construction heavy machinery activities (e.g., trenching, cable laying, etc.), if a marine mammal is on a path towards or comes within 10 m (32.8 ft) of equipment, Ocean Wind is required to cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment.

Once an activity begins, any marine mammal entering their respective shutdown zone would trigger the activity to cease. In the case of pile driving, the shutdown requirement may be waived if is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals or the lead engineer determines there is pile refusal or pile instability. Because UXO/MEC detonations are instantaneous, no shutdown is possible; therefore, there are clearance zones but no shutdown zones for UXO/MEC detonations (Table 38). In situations when shutdown is called for during impact pile driving but Ocean Wind determines shutdown is not practicable due to aforementioned emergency reasons, reduced hammer energy must be implemented when the lead engineer determines it is practicable. Specifically, pile refusal or pile instability could result in not being able to shut down pile driving immediately. Pile refusal occurs when the pile driving sensors indicate the pile is approaching refusal, and a shut-down would lead to a stuck pile which then poses an imminent risk of injury or loss

of life to an individual, or risk of damage to a vessel that creates risk for individuals. Pile instability occurs when the pile is unstable and unable to stay standing if the piling vessel were to “let go.” During these periods of instability, the lead engineer may determine a shutdown is not feasible because the shutdown combined with impending weather conditions may require the piling vessel to “let go” which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. Ocean Wind must

document and report to NMFS all cases where the emergency exemption is taken.

After shutdown, impact pile driving may be reinitiated once all clearance zones are clear of marine mammals for the minimum species-specific periods, or, if required to maintain pile stability, at which time the lowest hammer energy must be used to maintain stability. If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving must not restart until the North Atlantic right whale has neither been visually or

acoustically detected for 30 minutes. Upon re-starting pile driving, soft-start protocols must be followed if pile driving has ceased for 30 minutes or longer.

The clearance and shutdown zone sizes vary by species and are shown in Table 36, Table 37, and Table 38. Ocean Wind is allowed to request modification to these zone sizes pending results of sound field verification (see regulatory text at the end of this rulemaking). Any changes to zone size would be part of adaptive management and would require NMFS’ approval.

TABLE 36—MINIMUM VISIBILITY, CLEARANCE, SHUTDOWN, AND LEVEL B HARASSMENT ZONES DURING IMPACT PILE DRIVING IN SUMMER (AND WINTER)^a

Monitoring zones	North atlantic right whales	Large whales	Delphinids	Harbor porpoises	Seals
Minimum Visibility Zone ^b	1,650 m (2,500 m)				
Clearance Zone ^{c,d}	Any distance ..	2,000 m (3,000 m)	100 m	1,100 m (1,750 m)	100 m
Shutdown Zone ^d	Any distance ..	1,800 m (2,500 m)	100 m	1,000 m (1,450 m)	100 m
PAM Monitoring Zone	10,000 m				
Level B Harassment (Acoustic Range, R _{95%})	Monopiles: 3,253 m (3,534 m) Pin Piles: 2,155 m (2,522 m)				

^a Winter (*i.e.*, December) distances are presented in parentheses.

^b The minimum visibility zone is equal to the modeled maximum ER_{95%} distances to the Level A harassment threshold for low-frequency cetaceans, assuming 10 dB of attenuation.

^c The clearance zone is equal to the maximum Level A harassment distance for each species group (assuming 10 dB of attenuation) plus 20 percent or a minimum of 100 m (whichever is greater).

^d This zone applies to both visual and PAM.

TABLE 37—DISTANCES TO HARASSMENT THRESHOLDS AND MITIGATION ZONES^a DURING VIBRATORY DRIVING OF SHEET PILES AND/OR CASING PIPE PILES FOR COFFERDAMS AND GOAL POSTS^d

Marine mammal hearing groups	Level A harassment (SEL _{cum}) (m)	Level B harassment (m)	Clearance zone ^b (m)	Shutdown zone ^c (m)
Low-frequency cetaceans	86.7	10,000	150	100
Mid-frequency cetaceans	7.7	10,000	150	100
High-frequency cetaceans	128.2	10,000	150	150
Phocid Pinnipeds	52.7	10,000	150	60

Note: SEL_{cum} = cumulative sound exposure level; SPL_{pk} = peak sound pressure level.

^a Zone sizes are based upon a practical spreading loss model and a source level of 165.0 dB re 1 μPa (JASCO, 2021).

^b The clearance zones for large whales, porpoises, and seals are based upon the maximum Level A harassment zone for temporary cofferdams (128.2 m; Table 37) and rounded up for PSO clarity.

^c The shutdown zones for large whales (including North Atlantic right whale) and porpoises are based upon the maximum Level A harassment zone for each group and rounded up for PSO clarity. Shutdown zones for other dolphins and pilot whales were set using precautionary distances.

^d Although Ocean Wind is also building temporary goal posts in some locations to aid their nearshore installation work, they have committed to using the same zones previously proposed for temporary cofferdams as they are considered more conservative and protective.

In the proposed rule, we presented zone sizes based solely on the largest charge weight due to uncertainty on how accurately these charge weights could be identified in the water. Since the proposed rule, Ocean Wind has reliably demonstrated that they can identify charge weights in the field to allow for charge weight-specific mitigative zones. Because of this, Ocean

Wind is required to implement the As Low as Reasonably Practicable (ALARP) process, as described in the UXO/MEC Charge Weight Memo. This process requires Ocean Wind to undertake “lift-and-shift” (*i.e.*, physical removal) and then lead up to *in-situ* disposal, as necessary, which could include low-order (deflagration) to high-order (detonation) methods of removal.

Another approach involves the cutting of the UXO/MEC to extract any explosive components. Implementing the ALARP approach would minimize potential impacts to marine mammals as UXOs/MECs would only be detonated as a last resort. Ocean Wind will follow a Risk Management Framework designed to align with the ALARP principle which includes historical

research/hazard profiling, communication with all relevant State and Federal Agencies, and the standards within their removal plan (see the UXO/MEC Charge Weight Memo); we believe there is a high level of certainty that charge weights and appropriate removal approaches can be implemented in the field. Furthermore, we believe that this approach will ensure the least practicable adverse impact on marine mammals by mitigating the potential for TTS for each charge weight. The UXO/

MEC Charge Weight Memo is found on NMFS' website at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>.

In following this charge weight-specific approach, Ocean Wind is required to clear the relevant zones as described in Table 38. These zones are based on (but not equal to) the greatest TTS threshold distances for each charge weight at any modeled site. We note

that harbor porpoises and seals are difficult to detect at great distances but, due to the UXO/MEC detonation time of year restrictions, their abundance is likely to be relatively low. These zone sizes may be adjusted based on SFV and confirmation of the UXO/MEC or donor charge sizes after approval by NMFS.

No minimum visibility zone is required for UXO/MEC detonation as the entire visual clearance zone must be clear given the potential for lung and gastrointestinal tract injury.

TABLE 38—CLEARANCE, LEVEL A HARASSMENT, AND LEVEL B HARASSMENT ZONES DURING UXO/MEC DETONATIONS, BY CHARGE WEIGHT AND ASSUMING 10 dB OF SOUND ATTENUATION

UXO/MEC charge weights		Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocid pinnipeds
E4 (2.3 kg)	Level A harassment (m)	552	50	1,820	182
	Level B harassment (m)	2,82	453	6,160	1,470
	Clearance Zone (m) ^{a b}	2,500	500	2,500	1,000
E6 (9.1 kg)	Level A harassment (m)	982	75	2,590	357
	Level B harassment (m)	4,680	773	8,000	2,350
	Clearance Zone (m) ^{a b}	4,000	600	4,000	1,500
E8 (45.5 kg)	Level A harassment (m)	1,730	156	3,900	690
	Level B harassment (m)	7,490	1,240	10,300	3,820
	Clearance Zone (m) ^{a b}	6,000	1,000	6,000	3,000
E10 (227 kg)	Level A harassment (m)	2,970	337	5,400	1,220
	Level B harassment (m)	10,500	2,120	12,900	5,980
	Clearance Zone (m) ^{a b}	9,000	1,500	9,000	4,000
E12 (454 kg)	Level A harassment (m)	3,780	461	6,200	1,600
	Level B harassment (m)	11,900	2,550	14,100	7,020
	Clearance Zone (m) ^{a b}	10,000	2,000	10,000	5,000

^a The clearance zones presented here for the Level B harassment thresholds were derived based on an approximate proportion of the size of the Level B harassment isopleth.

^b Some of the zones have been rounded for PSO clarity.

TABLE 39—LEVEL B HARASSMENT THRESHOLD RANGES AND MITIGATION ZONES DURING HRG SURVEYS

Marine mammal species	Level B harassment zone (m)		Clearance zone (m)	Shutdown zone (m)
	Boomer/sparker	CHIRPs		
Low-frequency cetacean (North Atlantic right whale)	141	48	500	500
Other low-frequency cetaceans (non-North Atlantic right whale species)	.....	.....	100	100
Mid-frequency cetaceans	141	48	100	^a 100
High-frequency cetaceans	141	48	100	^b 100
Phocid Pinnipeds	141	48	100	100

^a An exception is noted for bow-riding delphinids of the following genera: Delphinus, Stenella, Lagenorhynchus, and Tursiops.

^b NMFS corrects a typo here where the shutdown zone size for high-frequency cetaceans was incorrectly labeled as 199 m. This has been corrected to 100 m.

Soft-Start/Ramp-Up

The use of a soft-start or ramp-up procedure is believed to provide additional protection to marine mammals by warning them, or providing them with a chance to leave the area prior to the hammer or HRG equipment operating at full capacity. Soft-start typically involves initiating hammer operation at a reduced energy level (relative to full operating capacity) followed by a waiting period. Ocean Wind must utilize a soft-start protocol

for impact pile driving of monopiles by performing four to six strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes. NMFS notes that it is difficult to specify a reduction in energy for any given hammer because of variation across drivers and installation conditions. The final methodology will be developed by Ocean Wind considering final design details including site-specific soil properties and other considerations. HRG survey operators are required to ramp-up

sources when the acoustic sources are used unless the equipment operates on a binary on/off switch. The ramp-up would involve starting from the smallest setting to the operating level over a period of approximately 30 minutes. Given the instantaneous nature of UXO/MEC detonations, no ramp-up/soft-start protocol is possible.

Soft-start and ramp-up will be required at the beginning of each day's activity and at any time following a cessation of activity of 30 minutes or longer. Prior to soft-start or ramp-up

beginning, the operator must receive confirmation from the PSO that the clearance zone is clear of any marine mammals.

Fishery Monitoring Surveys

While the likelihood of Ocean Wind's fishery monitoring surveys impacting marine mammals is minimal, NMFS requires Ocean Wind to adhere to gear and vessel mitigation measures to reduce potential impacts to the extent practicable. In addition, all crew undertaking the fishery monitoring survey activities are required to receive protected species identification training prior to activities occurring and attend the aforementioned onboarding training. The specific requirements that NMFS has set for the fishery monitoring surveys can be found in the regulatory text at the end of this rulemaking.

Based on our evaluation of the mitigation measures, as well as other measures considered by NMFS, NMFS has determined that these measures will provide the means of affecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

As noted in the Changes From the Proposed to Final Rule section, we have added, modified, or clarified a number of monitoring and reporting measures since the proposed rule. These changes are described in detail in the sections below and, otherwise, the marine mammal monitoring and reporting requirements have not changed since the proposed rule.

In order to promulgate a rulemaking for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (e.g., presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (e.g., source characterization, propagation, ambient noise); (2) affected species (e.g., life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (e.g., age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (e.g., marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and/or
- Mitigation and monitoring effectiveness.

Separately, monitoring is also regularly used to support mitigation implementation, which is referred to as mitigation monitoring, and monitoring plans typically include measures that both support mitigation implementation and increase our understanding of the impacts of the activity on marine mammals.

During the planned activities, visual monitoring by NMFS-approved PSOs would be conducted before, during, and after all impact pile driving, vibratory pile driving, UXO/MEC detonations, and HRG surveys. PAM would be also conducted during impact pile driving and UXO/MEC detonations. Visual observations and acoustic detections would be used to support the activity-specific mitigation measures (e.g., clearance zones). To increase understanding of the impacts of the activity on marine mammals, PSOs must record all incidents of marine mammal occurrence at any distance from the piling locations, near the HRG acoustic sources, and during UXO/MEC detonations. PSOs would document all behaviors and behavioral changes, in concert with distance from an acoustic source. The required monitoring is described below, beginning with PSO measures that are applicable to all the aforementioned activities, followed by

activity-specific monitoring requirements.

Protected Species Observer and PAM Operator Requirements

Ocean Wind is required to employ NMFS-approved PSOs and PAM operators. PSOs are trained professionals who are tasked with visually monitoring for marine mammals during pile driving, UXO/MEC detonation, and HRG surveys. The primary purpose of a PSO is to carry out the monitoring, collect data, and, when appropriate, call for the implementation of mitigation measures. In addition to visual observations, NMFS requires Ocean Wind to conduct PAM by PAM operators during impact pile driving, UXO/MEC detonations, and vessel transit.

The inclusion of PAM, which would be conducted by NMFS-approved PAM operators, following a standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind, alongside visual data collection is valuable to provide the most accurate record of species presence as possible and, together, these two monitoring methods are well understood to provide best results when combined together (e.g., Barlow and Taylor, 2005; Clark *et al.*, 2010; Gerrodette *et al.*, 2011; Van Parijs *et al.*, 2021). Acoustic monitoring (in addition to visual monitoring) increases the likelihood of detecting marine mammals within the shutdown and clearance zones of project activities, which when applied in combination of required shutdowns helps to further reduce the risk of marine mammals being exposed to sound levels that could otherwise result in acoustic injury or more intense behavioral harassment.

The exact configuration and number of PAM systems depends on the size of the zone(s) being monitored, the amount of noise expected in the area, and the characteristics of the signals being monitored. More closely spaced hydrophones would allow for more directionality, and perhaps, range to the vocalizing marine mammals; although, this approach would add additional costs and greater levels of complexity to the project. Larger baleen cetacean species (*i.e.*, mysticetes), which produce loud and lower-frequency vocalizations, may be able to be heard with fewer hydrophones spaced at greater distances. However, smaller cetaceans (such as mid-frequency delphinids; odontocetes) may necessitate more hydrophones and to be spaced closer together given the shorter range of the shorter, mid-frequency acoustic signals (e.g., whistles and echolocation clicks).

As there are no “perfect fit” single-optimal-array configurations, these setups would need to be considered on a case-by-case basis.

NMFS does not formally administer any PSO or PAM operator training program or endorse specific providers but will approve PSOs and PAM operators that have successfully completed courses that meet the curriculum and trainer requirements referenced below and further specified in the regulatory text at the end of this rulemaking.

NMFS will provide PSO and PAM operator approvals in the context of the need to ensure that PSOs and PAM operators have the necessary training and/or experience to carry out their duties competently. In order for PSOs and PAM operators to be approved, NMFS must review and approve PSO and PAM operator resumes indicating successful completion of an acceptable training course. PSOs and PAM operators must have previous experience observing marine mammals and must have the ability to work with all required and relevant software and equipment. NMFS may approve PSOs and PAM operators as conditional or unconditional. A conditional approval may be given to one who is trained but has not yet attained the requisite experience. An unconditional approval is given to one who is trained and has attained the necessary experience. The specific requirements for conditional and unconditional approval can be found in the regulatory text at the end of this rulemaking.

Conditionally-approved PSOs and PAM operators would be paired with an unconditional-approved PSO (or PAM operator, as appropriate) to ensure that the quality of marine mammal observations and data recording is kept consistent. Additionally, activities requiring PSO and/or PAM operator monitoring must have a lead on duty. The visual PSO field team, in conjunction with the PAM team (*i.e.*, marine mammal monitoring team), would have a lead member (designated as the “Lead PSO” or “Lead PAM operator”) who would be required to meet the unconditional approval standard.

Although PSOs and PAM operators must be approved by NMFS, third-party observer providers and/or companies seeking PSO and PAM operator staffing should expect that those having satisfactorily completed acceptable training and with the requisite experience (if required) will be quickly approved. Ocean Wind is required to request PSO and PAM operator approvals 60 days prior to those

personnel commencing work. An initial list of previously approved PSO and PAM operators must be submitted by Ocean Wind at least 30 days prior to the start of the project. Should Ocean Wind require additional PSOs or PAM operators throughout the project, Ocean Wind must submit a subsequent list of pre-approved PSOs and PAM operators to NMFS at least 15 days prior to planned use of that PSO or PAM operator. A PSO may be trained and/or experienced as both a PSO and PAM operator and may perform either duty, pursuant to scheduling requirements (and vice versa).

A minimum number of PSOs would be required to actively observe for the presence of marine mammals during certain project activities with more PSOs required as the mitigation zone sizes increase. A minimum number of PAM operators would be required to actively monitor for the presence of marine mammals during foundation installation and UXO/MEC detonation. The types of equipment required (*e.g.*, big eyes on the pile driving vessel) are also designed to increase marine mammal detection capabilities. Specifics on these types of requirements can be found in the regulations at the end of this rulemaking. In summary, at least three PSOs and one PAM operator per acoustic data stream (equivalent to the number of acoustic buoys) must be on-duty and actively monitoring per platform during foundation installation and any UXO/MEC detonation event; at least two PSOs must be on duty during cable landfall construction vibratory pile installation and removal; at least one PSO must be on-duty during HRG surveys conducted during daylight hours; and at least two PSOs must be on-duty during HRG surveys conducted during nighttime.

In addition to monitoring duties, PSOs and PAM operators are responsible for data collection. The data collected by PSO and PAM operators and subsequent analysis provide the necessary information to inform an estimate of the amount of take that occurred during the project, better understand the impacts of the project on marine mammals, address the effectiveness of monitoring and mitigation measures, and to adaptively manage activities and mitigation in the future. Data reported includes information on marine mammal sightings, activity occurring at time of sighting, monitoring conditions, and if mitigative actions were taken. Specific data collection requirements are contained within the regulations at the end of this rulemaking.

Ocean Wind is required to submit a Pile Driving and UXO/MEC Marine Mammal Monitoring Plan and a PAM Plan to NMFS 180 days in advance of foundation installation activities. The Plan must include details regarding PSO and PAM monitoring protocols and equipment proposed for use. More specifically, the PAM Plan must include a description of all proposed PAM equipment, address how the proposed passive acoustic monitoring must follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind as described in *NOAA and BOEM Minimum Recommendations for Use of Passive Acoustic Listening Systems in Offshore Wind Energy Development Monitoring and Mitigation Programs* (Van Parijs *et al.*, 2021). NMFS must approve the plan prior to foundation installation activities or UXO/MEC detonation commencing. Specific details on NMFS’ PSO or PAM operator qualifications and requirements can be found in Part 217—Regulations Governing The Taking And Importing Of Marine Mammals at the end of this rulemaking. Additional information can be found in Ocean Wind’s Protected Species Mitigation and Monitoring Plan (PSMMP) (Appendix B) found in their ITA application on NMFS’ website at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-ocean-wind-lcc-construction-ocean-wind-1-wind-energy-facility>.

Sound Field Verification

Ocean Wind must conduct SFV measurements during all UXO/MEC detonations and for all impact pile-driving activities associated with the installation of, at minimum, the first three monopile foundations. SFV measurements must continue until at least three consecutive piles demonstrate distances to thresholds are at or below those modeled assuming 10 dB of attenuation. Subsequent SFV measurements are also required should larger piles be installed or additional piles be driven that are anticipated to produce longer distances to harassment isopleths than those previously measured (*e.g.*, higher hammer energy, greater number of strikes, *etc.*). The measurements and reporting associated with SFV can be found in the regulatory text at the end of this rulemaking. The requirements are extensive to ensure monitoring is conducted appropriately and the reporting frequency is such that Ocean Wind is required to make adjustments quickly (*e.g.*, ensure bubble curtain hose maintenance, check bubble curtain air pressure supply, add additional sound attenuation, *etc.*) to

ensure marine mammals are not experiencing noise levels above those considered in this analysis. For recommended SFV protocols for impact pile driving, please consult ISO 18406 *Underwater acoustics—Measurement of radiated underwater sound from percussive pile driving* (2017).

Reporting

Prior to any construction activities occurring, Ocean Wind would provide a report to NMFS Office of Protected Resources that demonstrates that all required training for Ocean Wind personnel, which includes the vessel crews, vessel captains, PSOs, and PAM operators have completed all required trainings.

NMFS would require standardized and frequent reporting from Ocean Wind during the life of the regulations and LOA. All data collected relating to the Project would be recorded using industry-standard software (e.g., Mysticetus or a similar software) installed on field laptops and/or tablets. Ocean Wind is required to submit weekly, monthly, annual, and situational reports. The specifics of what we require to be reported can be found in the regulatory text at the end of this final rule.

Weekly Report—During foundation installation activities, Ocean Wind would be required to compile and submit weekly marine mammal monitoring reports for foundation installation pile driving to NMFS Office of Protected Resources that document the daily start and stop of all pile-driving activities, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all detections of marine mammals (acoustic and visual), any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise abatement system(s) (e.g., system type, distance deployed from the pile, bubble rate, etc.). Weekly reports will be due on Wednesday for the previous week (Sunday to Saturday). The weekly reports are also required to identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is complete, weekly reports would no longer be required.

Monthly Report—Ocean Wind is required to compile and submit monthly reports to NMFS Office of Protected Resources that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, all detections

of marine mammals, and any mitigative actions taken. Monthly reports would be due on the 15th of the month for the previous month. The monthly report would also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is complete, monthly reports would no longer be required.

Annual Reporting—Ocean Wind is required to submit an annual marine mammal monitoring (both PSO and PAM) report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year describing, in detail, all of the information required in the monitoring section above. A final annual report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report.

Final 5-Year Reporting—Ocean Wind must submit its draft 5-year report(s) to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS comments on the draft report. Information contained within this report is described at the beginning of this section.

Situational Reporting—Specific situations encountered during the development of the Project requires immediate reporting. For instance, if a North Atlantic right whale is observed at any time by PSOs or project personnel, the sighting must be immediately (if not feasible, as soon as possible and no longer than 24 hours after the sighting) reported to NMFS. If a North Atlantic right whale is acoustically detected at any time via a project-related PAM system, the detection must be reported as soon as possible and no longer than 24 hours after the detection to NMFS via the 24-hour North Atlantic right whale Detection Template (<https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates>). Calling the hotline is not necessary when reporting PAM detections via the template.

If a sighting of a stranded, entangled, injured, or dead marine mammal occurs, the sighting would be reported to NMFS Office of Protected Resources, the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866-755-6622), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, Ocean Wind must immediately cease all

activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Ocean Wind may not resume their activities until notified by NMFS Office of Protected Resources.

In the event of a vessel strike of a marine mammal by any vessel associated with the Project, Ocean Wind must immediately report the strike incident. If the strike occurs in the Greater Atlantic Region (Maine to Virginia), Ocean Wind must call the NMFS Greater Atlantic Stranding Hotline. Separately, Ocean Wind must also and immediately report the incident to NMFS Office of Protected Resources and GARFO. Ocean Wind must immediately cease all on-water activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Ocean Wind may not resume their activities until notified by NMFS.

In the event of any lost gear associated with the fishery surveys, Ocean Wind must report to the GARFO as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

The specifics of what NMFS Office of Protected Resources requires to be reported is listed at the end of this rulemaking in the regulatory text.

Sound Field Verification—Ocean Wind is required to submit interim SFV reports after each foundation installation and UXO/MEC detonation monitored as soon as possible but within 48 hours. A final SFV report for all monopile foundation installation and UXO/MEC detonations would be required within 90 days following completion of acoustic monitoring.

Adaptive Management

The regulations governing the take of marine mammals incidental to Ocean Wind's construction activities contain an adaptive management component. Our understanding of the effects of

offshore wind construction activities (e.g., acoustic and explosive stressors) on marine mammals continues to evolve, which makes the inclusion of an adaptive management component both valuable and necessary within the context of 5-year regulations.

The monitoring and reporting requirements in this final rule provide NMFS with information that helps us to better understand the impacts of the project's activities on marine mammals and informs our consideration of whether any changes to mitigation and monitoring are appropriate. The use of adaptive management allows NMFS to consider new information and modify mitigation, monitoring, or reporting requirements, as appropriate, with input from Ocean Wind regarding practicability, if such modifications will have a reasonable likelihood of more effectively accomplishing the goal of the measures.

The following are some of the possible sources of new information to be considered through the adaptive management process: (1) results from monitoring reports, including the weekly, monthly, situational, and annual reports required; (2) results from marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOA. During the course of the rule, Ocean Wind (and other LOA Holders conducting offshore wind development activities) are required to participate in one or more adaptive management meetings convened by NMFS and/or BOEM, in which the above information will be summarized and discussed in the context of potential changes to the mitigation or monitoring measures.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e., population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" by mortality, serious injury, Level A harassment and Level B harassment, we

consider other factors, such as the likely nature of any behavioral responses (e.g., intensity, duration), the context of any such responses (e.g., critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (e.g., as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

In the Estimated Take section to this preamble, we discuss the estimated maximum number of takes by Level A harassment and Level B harassment that could occur from Ocean Wind's specified activities based on the methods described. The impact that any given take would have is dependent on many case-specific factors that need to be considered in the negligible impact analysis (e.g., the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, etc.). In this final rule, we evaluate the likely impacts of the enumerated harassment takes that are authorized in the context of the specific circumstances surrounding these predicted takes. We also collectively evaluate this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific discussions that support our negligible impact conclusions for each stock. As described above, no serious injury or mortality is expected or authorized for any species or stock.

The Description of the Specified Activities section of this preamble describes Ocean Wind's specified activities that may result in take of marine mammals and an estimated schedule for conducting those activities. Ocean Wind has provided a realistic construction schedule although we recognize schedules may shift for a variety of reasons (e.g., weather or supply delays). However, the total amount of take would not exceed the 5-year totals and maximum annual total in any given year indicated in Tables 34 and 35, respectively.

We base our analysis and negligible impact determination on the maximum number of takes that could occur and

are authorized annually and across the effective period of these regulations and extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals and the number and context of the individuals affected. As stated before, the number of takes, both maximum annual and 5-year total, alone are only a part of the analysis.

To avoid repetition, we provide some general analysis in this Negligible Impact Analysis and Determination section that applies to all the species listed in Table 2, given that some of the anticipated effects of Ocean Wind's construction activities on marine mammals are expected to be relatively similar in nature. Then, we subdivide into more detailed discussions for mysticetes, odontocetes, and pinnipeds which have broad life-history traits that support an overarching discussion of some factors considered within the analysis for those groups (e.g., habitat-use patterns, high-level differences in feeding strategies).

Last, we provide a negligible impact determination for each species or stock, providing species or stock-specific information or analysis, where appropriate, for example, for North Atlantic right whales given their population status. Organizing our analysis by grouping species or stocks that share common traits or that would respond similarly to effects of Ocean Wind's activities, and then providing species- or stock-specific information allows us to avoid duplication while ensuring that we have analyzed the effects of the specified activities on each affected species or stock. It is important to note that in the group or species sections, we base our negligible impact analysis on the maximum annual take that is predicted under the 5-year rule; however, the majority of the impacts are associated with WTG foundation and OSS foundation installation, which would occur largely within the first 2 to 3 years (2023 through 2024 or 2025). The estimated take in the other years is expected to be notably less, which is reflected in the total take that would be allowable under the rule (see Tables 33, 34, and 35).

As described previously, no serious injury or mortality is anticipated or authorized in this rule. Any Level A harassment authorized would be in the form of auditory injury (i.e., PTS) and not non-auditory injury (e.g., lung injury or gastrointestinal injury from UXO/MEC detonation). The amount of harassment Ocean Wind has requested, and NMFS is authorizing, is based on exposure models that consider the outputs of acoustic source and

propagation models and other data such as frequency of occurrence or group sizes. Several conservative parameters and assumptions are ingrained into these models, such as assuming forcing functions that consider direct contact with piles (*i.e.*, no cushion allowances) and application of the average summer sound speed profile to all months within a given season. The exposure model results do not reflect any mitigation measures (other than 10 dB sound attenuation) or avoidance response. The amount of take requested and authorized also reflects careful consideration of other data (*e.g.*, group size data) and for Level A harassment potential of some large whales, the consideration of mitigation measures. For all species, the amount of take authorized represents the maximum amount of Level A harassment and Level B harassment that could occur.

Behavioral Disturbance

In general, NMFS anticipates that impacts on an individual that has been harassed are likely to be more intense when exposed to higher received levels and for a longer duration (though this is in no way a strictly linear relationship for behavioral effects across species, individuals, or circumstances) and less severe impacts result when exposed to lower received levels and for a brief duration. However, there is also growing evidence of the importance of contextual factors such as distance from a source in predicting marine mammal behavioral response to sound—*i.e.*, sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (DeRuiter and Doukara, 2012; Falcone *et al.*, 2017). As described in the Potential Effects to Marine Mammals and their Habitat section of the proposed rule, the intensity and duration of any impact resulting from exposure to Ocean Wind's activities is dependent upon a number of contextual factors including, but not limited to, sound source frequencies, whether the sound source is moving towards the animal, hearing ranges of marine mammals, behavioral state at time of exposure, status of individual exposed (*e.g.*, reproductive status, age class, health) and an individual's experience with similar sound sources. Southall *et al.* (2021), Ellison *et al.* (2012) and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.*, behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources. Harassment of marine mammals may

result in behavioral modifications (*e.g.*, avoidance, temporary cessation of foraging or communicating, changes in respiration or group dynamics, masking) or may result in auditory impacts such as hearing loss. In addition, some of the lower level physiological stress responses (*e.g.*, change in respiration, change in heart rate) discussed previously would likely co-occur with the behavioral modifications, although these physiological responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. Takes by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect Ocean Wind's activities to produce conditions of long-term and continuous exposure to noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

In the range of behavioral effects that might be expected to be part of a response that qualifies as an instance of Level B harassment by behavioral disturbance (which by nature of the way it is modeled/counted, occurs within 1 day), the less severe end might include exposure to comparatively lower levels of a sound, at a greater distance from the animal, for a few or several minutes. A less severe exposure of this nature could result in a behavioral response such as avoiding an area that an animal would otherwise have chosen to move through or feed in for some amount of time, or breaking off one or a few feeding bouts. More severe effects could occur if an animal gets close enough to the source to receive a comparatively higher level, is exposed continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

Many species perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure, when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than 1 day or recur on subsequent days (Southall *et al.*, 2007) due to diel and lunar patterns in diving and foraging behaviors observed in many cetaceans (Baird *et al.*, 2008; Barlow *et al.*, 2020; Henderson *et al.*, 2016; Schorr *et al.*, 2014). It is important

to note the water depth in the Project Area is shallow (ranging up to 40 m in the ECRs and 15 to 36 m in the Lease Area) and deep diving species, such as sperm whales, are not expected to be engaging in deep foraging dives when exposed to noise above NMFS harassment thresholds during the specified activities. Therefore, we do not anticipate impacts to deep foraging behavior to be impacted by the specified activities.

It is also important to identify that the estimated number of takes does not necessarily equate to the number of individual animals Ocean Wind expects to harass (which is lower) but rather to the instances of take (*i.e.*, exposures above the Level B harassment thresholds) that may occur. These instances may represent either brief exposures of seconds for UXO/MEC detonations, seconds to minutes for HRG surveys, or, in some cases, longer durations of exposure within a day (*e.g.*, pile driving). Some individuals of a species may experience recurring instances of take over multiple days throughout the year while some members of a species or stock may experience one exposure as they move through an area, which means that the number of individuals taken is smaller than the total estimated takes. In short, for species that are more likely to be migrating through the area and/or for which only a comparatively smaller number of takes are predicted (*e.g.*, some of the mysticetes), it is more likely that each take represents a different individual whereas for non-migrating species with larger amounts of predicted take, we expect that the total anticipated takes represent exposures of a smaller number of individuals of which some would be taken across multiple days.

For Ocean Wind, impact pile driving of foundation piles is most likely to result in a higher magnitude and severity of behavioral disturbance than other activities (*i.e.*, vibratory pile driving, UXO/MEC detonations, and HRG surveys). Impact pile driving has higher source levels and longer durations (on an annual basis) than vibratory pile driving and HRG surveys. HRG survey equipment also produces much higher frequencies than pile driving, resulting in minimal sound propagation. While UXO/MEC detonations may have higher source levels, impact pile driving is planned for longer durations (*i.e.*, a maximum of 10 UXO/MEC detonations are planned, which would result in only instantaneous exposures). While impact pile driving for foundation installation is anticipated to be most impactful for these reasons, impacts are minimized

through implementation of mitigation measures, including use of a sound attenuation system, soft-starts, the implementation of clearance zones that would facilitate a delay to pile-driving commencement, and implementation of shutdown zones. For example, given sufficient notice through the use of soft-start, marine mammals are expected to move away from a sound source that is disturbing prior to becoming exposed to very loud noise levels. The requirement to couple visual monitoring and PAM before and during all foundation installation and UXO/MEC detonations will increase the overall capability to detect marine mammals compared to one method alone. Measures such as the requirement to apply sound attenuation devices and implement clearance zones also apply to UXO/MEC detonation(s), which also have the potential to elicit more severe behavioral reactions in the unlikely event that an animal is relatively close to the explosion in the instant that it occurs; hence, severity of behavioral responses are expected to be lower than would be the case without mitigation.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more severe response, if they are not expected to be repeated over numerous or sequential days, impacts to individual fitness are not anticipated. Also, the effect of disturbance is strongly influenced by whether it overlaps with biologically important habitats when individuals are present—avoiding biologically important habitats will provide opportunities to compensate for reduced or lost foraging (Keen *et al.*, 2021). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.*, 2018; Harris *et al.*, 2017; King *et al.*, 2015; National Academy of Science, 2017; New *et al.*, 2014; Southall *et al.*, 2007; Villegas-Amtmann *et al.*, 2015).

Temporary Threshold Shift (TTS)

TTS is one form of Level B harassment that marine mammals may incur through exposure to Ocean Wind's activities and, as described earlier, the takes by Level B harassment may represent takes in the form of behavioral disturbance, TTS, or both. As discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section of the proposed rule, in general, TTS can last from a few minutes to days, be of varying degree,

and occur across different frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Impact and vibratory pile driving and UXO/MEC detonations are broadband noise sources but generate sounds in the lower frequency ranges (with most of the energy below 1–2 kHz, but with a small amount of energy ranging up to 20 kHz); therefore, in general and all else being equal, we would anticipate the potential for TTS is higher in low-frequency cetaceans (*i.e.*, mysticetes) than other marine mammal hearing groups and would be more likely to occur in frequency bands in which they communicate. However, we would not expect the TTS to span the entire communication or hearing range of any species given that the frequencies produced by these activities do not span entire hearing ranges for any particular species. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalizations, the frequency range of TTS from Ocean Wind's pile driving and UXO/MEC detonation activities would not typically span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. The required mitigation measures further reduce the potential for TTS in mysticetes.

Generally, both the degree of TTS and the duration of TTS would be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed previously (see the Estimated Take section of this preamble). However, source level alone is not a predictor of TTS. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the required mitigation and the nominal speed of the receiving animal relative to the stationary sources such as impact pile driving. The recovery time of TTS is also of importance when considering the potential impacts from TTS. In TTS laboratory studies (as discussed in the Potential Effects of the Specified Activities on Marine Mammals and their Habitat section of the proposed rule), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes) and we note that

while the pile-driving activities last for hours a day, it is unlikely that most marine mammals would stay in the close vicinity of the source long enough to incur more severe TTS. UXO/MEC detonation also has the potential to result in TTS. However, given the duration of exposure is extremely short (milliseconds), the degree of TTS (*i.e.*, the amount of dB shift) is expected to be small and TTS duration is expected to be short (minutes to hours). Overall, given the small number of times that any individual might incur TTS, the low degree of TTS and the short anticipated duration, and the unlikely scenario that any TTS overlapped the entirety of a critical hearing range, it is unlikely that TTS (of the nature expected to result from the project's activities) would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Permanent Threshold Shift (PTS)

NMFS is authorizing a very small amount of take by PTS to some marine mammal individuals. The numbers of authorized annual takes by Level A harassment are relatively low for all marine mammal stocks and species (Table 33). The only activities incidental to which we anticipate PTS may occur is from exposure to impact pile driving and UXO/MEC detonation, which produces sounds that are both impulsive and primarily concentrated in the lower frequency ranges (below 1 kHz) (David, 2006; Krumpel *et al.*, 2021).

There are no PTS data on cetaceans and only one instance of PTS being induced in older harbor seals (Reichmuth *et al.*, 2019). However, available TTS data (of mid-frequency hearing specialists exposed to mid- or high-frequency sounds (Southall *et al.*, 2007; NMFS, 2018; Southall *et al.*, 2019)) suggest that most threshold shifts occur in the frequency range of the source up to one octave higher than the source. We would anticipate a similar result for PTS. Further, no more than a small degree of PTS is expected to be associated with any of the incurred Level A harassment, given it is unlikely that animals would stay in the close vicinity of a source for a duration long enough to produce more than a small degree of PTS.

PTS would consist of minor degradation of hearing capabilities occurring predominantly at frequencies one-half to one octave above the frequency of the energy produced by pile driving or instantaneous UXO/MEC detonation (*i.e.*, the low-frequency region below 2 kHz) (Cody and

Johnstone, 1981; McFadden, 1986; Finneran, 2015), not severe hearing impairment. If hearing impairment occurs from either impact pile driving or UXO/MEC detonation, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. Ocean Wind estimates 10 UXOs/MECs may be detonated and the exposure analysis conservatively assumes that all of the UXOs/MECs found would consist of the largest charge weight of UXO/MEC (E12; 454 kg). However, it is highly unlikely that all charges would be the maximum size; thus, the amount of Level A harassment that may occur incidental to the detonation of the UXOs/MECs is likely less than what is estimated here. In addition, during impact pile driving, given sufficient notice through use of soft-start prior to implementation of full hammer energy during impact pile driving, marine mammals are expected to move away from a sound source that is disturbing prior to it resulting in severe PTS.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual are similar to those discussed for TTS (*e.g.*, decreased ability to communicate, forage effectively, or detect predators), but an important difference is that masking only occurs during the time of the signal, versus TTS, which continues beyond the duration of the signal. Also, though, masking can result from the sum of exposure to multiple signals, none of which might individually cause TTS. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency).

As our analysis has indicated, for this project we expect that impact pile driving foundations have the greatest potential to mask marine mammal signals, and this pile driving may occur for several, albeit intermittent, hours per day, for multiple days per year. Masking

is fundamentally more of a concern at lower frequencies (which are pile-driving dominant frequencies), because low frequency signals propagate significantly further than higher frequencies and because they are more likely to overlap both the narrower low frequency calls of mysticetes, as well as many non-communication cues related to fish and invertebrate prey, and geologic sounds that inform navigation. However, the area in which masking would occur for all marine mammal species and stocks (*e.g.*, predominantly in the vicinity of the foundation pile being driven) is small relative to the extent of habitat used by each species and stock. In summary, the nature of Ocean Wind's activities, paired with habitat use patterns by marine mammals, does not support the likelihood that the level of masking that could occur would have the potential to affect reproductive success or survival.

Impacts on Habitat and Prey

Construction activities and UXO/MEC detonation may result in fish and invertebrate mortality or injury very close to the source, and all Ocean Wind's activities may cause some fish to leave the area of disturbance. It is anticipated that any mortality or injury would be limited to a very small subset of available prey and the implementation of mitigation measures such as the use of a noise attenuation system during impact pile driving and UXO/MEC detonation would further limit the degree of impact (again noting UXO/MEC detonation would be limited to 10 events over 5 years). Behavioral changes in prey in response to construction activities could temporarily impact marine mammals' foraging opportunities in a limited portion of the foraging range but, because of the relatively small area of the habitat that may be affected at any given time (*e.g.*, around a pile being driven), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Cable presence is not anticipated to impact marine mammal habitat as these would be buried, and any electromagnetic fields emanating from the cables are not anticipated to result in consequences that would impact marine mammals' prey to the extent they would be unavailable for consumption.

The presence of wind turbines within the Lease Area could have longer-term impacts on marine mammal habitat, as the project would result in the persistence of the structures within marine mammal habitat for more than

30 years. The presence of structures such as wind turbines is, in general, likely to result in certain oceanographic effects in the marine environment, and may alter aggregations and distribution of marine mammal zooplankton prey through changing the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.*, 2021; Johnson *et al.*, 2021; Christiansen *et al.*, 2022; Dorrell *et al.*, 2022).

As discussed in the Potential Effects of the Specified Activities on Marine Mammals and their Habitat section of the proposed rule, the project would consist of no more than 101 foundations (98 WTGs and 3 OSSs) in the Lease Area, which will gradually become operational following construction completion, in around Year 3 of the rule. While there are likely to be oceanographic impacts from the presence of the Ocean Wind project, meaningful oceanographic impacts relative to stratification and mixing that would significantly affect marine mammal habitat and prey over large areas in key foraging habitats during the effective period of the regulations is not anticipated (which considers 2–3 years of turbine operation). For these reasons, if oceanographic features are affected by the project during the effective period of the regulations, the impact on marine mammal habitat and their prey is likely to be comparatively minor; therefore, we are not authorizing take due to habitat and prey impacts.

The Ocean Wind 1 Biological Opinion provided an evaluation of the presence and operation of the Project on, among other species, marine mammals and their prey. While the consultation considered the life of the project (25+ years), we considered the potential for the habitat and prey impacts to also occur within the 5-year effective time frame of this rule. Overall, the Biological Opinion concluded that impacts from loss of sandy bottom habitat (from the presence of turbines and placement of scour protection) as well as any beneficial reef effects are expected to be so small that they cannot be meaningfully measured, evaluated, or detected and are, therefore, insignificant. The Biological Opinion also concluded that the presence and operation of the wind farm may change the distribution of plankton with the wind farm, these changes are not expected to affect the oceanographic forces transporting zooplankton into the area. Therefore, the Biological Opinion concluded that the overall reduction in biomass of plankton is not an anticipated outcome of operating the

Project. Thus, because changes in the biomass of zooplankton are not anticipated, any higher trophic level impacts are also not anticipated. That is, no effects to pelagic fish or benthic invertebrates that depend on plankton as forage food are expected to occur. Zooplankton, fish and invertebrates are all considered marine mammal prey and, as fully described in the Biological Opinion, measurable, detectable or significant changes to marine mammal prey abundance and distribution from wind farm operation is not anticipated.

Mitigation To Reduce Impacts on All Species

This rulemaking includes a variety of mitigation measures designed to minimize impacts on all marine mammals, with a focus on North Atlantic right whales (the latter is described in more detail below). For impact pile driving of foundation piles and UXO/MEC detonations, nine overarching mitigation measures are required, which are intended to reduce both the number and intensity of marine mammal takes: (1) seasonal/time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection within specifically designated zones that would trigger a delay or shutdown); (3) use of PAM to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering delay or shutdown); (4) implementation of clearance zones; (5) implementation of shutdown zones; (6) use of soft-start; (7) use of noise attenuation technology; (8) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Ocean Wind personnel must be reported to PSOs; (9) sound field verification monitoring; and (10) Vessel Strike Avoidance measures to reduce the risk of a collision with a marine mammal and vessel. For cofferdam and goal post installation and removal, we are requiring five overarching mitigation measures: (1) seasonal/time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection with specifically designated zones that would trigger a delay or shutdown); (3) implementation of clearance zones; (4) implementation of shutdown zones; and (5) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Ocean Wind personnel must be reported to PSOs. Lastly, for HRG surveys, we are requiring six measures: (1) measures specifically for

Vessel Strike Avoidance; (2) specific requirements during daytime and nighttime HRG surveys; (3) implementation of clearance zones; (4) implementation of shutdown zones; (5) use of ramp-up of acoustic sources; and (6) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by Ocean Wind personnel must be reported to PSOs.

NMFS prescribes mitigation measures based on the following rationale. For activities with large harassment isopleths, Ocean Wind is committed to reducing the noise levels generated to the lowest levels practicable and is required to ensure that they do not exceed a noise footprint above that which was modeled, assuming a 10-dB attenuation. Use of a soft-start during impact pile driving will allow animals to move away from (*i.e.*, avoid) the sound source prior to applying higher hammer energy levels needed to install the pile (Ocean Wind will not use a hammer energy greater than necessary to install piles). Similarly, ramp-up during HRG surveys would allow animals to move away and avoid the acoustic sources before they reach their maximum energy level. For all activities (with some exception for UXO/MEC detonations, which would not have a shutdown zone), clearance zone and shutdown zone implementation, which are required when marine mammals are within given distances associated with certain impact thresholds for all activities, will reduce the magnitude and severity of marine mammal take. Additionally, the use of multiple PSOs (WTG and OSS foundation installation, temporary cofferdam and goal post installation and removal, UXO/MEC detonations, HRG surveys), PAM operators (for impact foundation installation and UXO/MEC detonations), and maintaining awareness of marine mammal sightings reported in the region (WTG and OSS foundation installation, temporary cofferdam and goal post installation and removal, UXO/MEC detonations, HRG surveys) will aid in detecting marine mammals that would trigger the implementation of the mitigation measures. The reporting requirements including SFV reporting (for foundation installation, foundation operation, and UXO/MEC detonations), will assist NMFS in identifying if impacts beyond those analyzed in this final rule are occurring, potentially leading to the need to enact adaptive management measures in addition to or in place of the mitigation measures.

Mysticetes

Six mysticete species (comprising six stocks) of cetaceans (North Atlantic right whale, blue whale, humpback whale, fin whale, sei whale, and minke whale) may be taken by harassment. These species, to varying extents, utilize the specified geographic region, including the Project Area, for the purposes of migration, foraging, and socializing. Mysticetes are in the low-frequency hearing group.

Behavioral data on mysticete reactions to pile-driving noise are scant. Kraus *et al.* (2019) predicted that the three main impacts of offshore wind farms on marine mammals would consist of displacement, behavioral disruptions, and stress. Broadly, we can look to studies that have focused on other noise sources such as seismic surveys and military training exercises, which suggest that exposure to loud signals can result in avoidance of the sound source (or displacement if the activity continues for a longer duration in a place where individuals would otherwise have been staying, which is less likely for mysticetes in this area), disruption of foraging activities (if they are occurring in the area), local masking around the source, associated stress responses, and impacts to prey, as well as TTS or PTS in some cases.

Mysticetes encountered in the Project Area are expected to primarily be migrating and, to a lesser degree, may be engaged in foraging behavior. The extent to which an animal engages in these behaviors in the area is species-specific and varies seasonally. Many mysticetes are expected to predominantly be migrating through the Project Area towards or from feeding ground located further north (*e.g.*, southern New England region, Gulf of Maine, Canada). While we acknowledged above that mortality, hearing impairment, or displacement of mysticete prey species may result locally from impact pile driving and UXO/MEC detonations, given the very short duration of and broad availability of prey species in the area and the availability of alternative suitable foraging habitat for the mysticete species most likely to be affected, any impacts on mysticete foraging is expected to be minor. Whales temporarily displaced from the Project Area are expected to have sufficient remaining feeding habitat available to them and would not be prevented from feeding in other areas within the biologically important feeding habitats found further north. In addition, any displacement of whales or interruption of foraging bouts would be expected to be relatively temporary in nature.

The potential for repeated exposures is dependent upon the residency time of whales, with migratory animals unlikely to be exposed on repeated occasions and animals remaining in the area to be more likely exposed repeatedly. For mysticetes, where relatively low amounts of species-specific take by Level B harassment are predicted (compared to the abundance of each mysticete species or stock, such as is indicated in Table 33) and movement patterns suggest that individuals would not necessarily linger in a particular area for multiple days, each predicted take likely represents an exposure of a different individual; the behavioral impacts would, therefore, be expected to occur within a single day within a year—an amount that would clearly not be expected to impact reproduction or survival. Species with longer residence time in the Project Area may be subject to repeated exposures across multiple days.

In general, for this project, the duration of exposures would not be continuous throughout any given day, and pile driving would not occur on all consecutive days within a given year due to weather delays or any number of logistical constraints Ocean Wind has identified. Species-specific analysis regarding potential for repeated exposures and impacts is provided below.

Fin, humpback, minke, and sei whales are the only mysticete species for which PTS is anticipated and authorized. As described previously, PTS for mysticetes from some project activities may overlap frequencies used for communication, navigation, or detecting prey. However, given the nature and duration of the activity, the mitigation measures, and likely avoidance behavior, any PTS is expected to be of a small degree, would be limited to frequencies where pile-driving noise is concentrated (*i.e.*, only a small subset of their expected hearing range) and would not be expected to impact reproductive success or survival.

North Atlantic Right Whale

North Atlantic right whales are listed as endangered under the ESA and as both depleted and strategic stock under the MMPA. As described in the Potential Effects to Marine Mammals and Their Habitat section of the proposed rule, North Atlantic right whales are threatened by a low population abundance, higher than average mortality rates, and lower than average reproductive rates. Recent studies have reported individuals showing high stress levels (*e.g.*, Corkeron *et al.*, 2017) and poor health,

which has further implications on reproductive success and calf survival (Christiansen *et al.*, 2020; Stewart *et al.*, 2021; Stewart *et al.*, 2022). As described below, a UME has been designated for North Atlantic right whales. Given this, the status of the North Atlantic right whale population is of heightened concern and, therefore, merits additional analysis and consideration. No injury or mortality is anticipated or authorized for this species.

For North Atlantic right whales, this rule authorizes up to 14 takes, by Level B harassment only, over the 5-year period, with a maximum annual allowable take of 7 (equating to approximately 2.1 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (*e.g.*, years when only HRG surveys would be occurring). The Project Area is known as a migratory corridor for North Atlantic right whales and given the nature of migratory behavior (*e.g.*, continuous path), as well as the low number of total takes, we anticipate that few, if any, of the instances of take would represent repeat takes of any individual, though it could occur if whales are engaged in opportunistic foraging behavior. Whitt *et al.* (2013) observed two juveniles potentially skim-feeding off the coast of Barnegat Bay, New Jersey in January. While opportunistic foraging may occur in the Project area, the habitat does not support prime foraging habitat.

The highest density of North Atlantic right whales in the Project Area occurs in the winter (Table 7). The Mid-Atlantic, including the Project Area, may be a stopover site for migrating North Atlantic right whales moving to or from southeastern calving grounds. Migrating North Atlantic right whales have been acoustically detected north of the Project Area in the New York Bight from February to May and August through December (Biedron *et al.*, 2009). Similarly, the waters off the coast of New Jersey, including those surrounding the Project Area in the New Jersey Wind Energy Area (NJ WEA), have documented North Atlantic right whale presence as the area is an important migratory route for the species to the northern feeding areas near the Gulf of Maine and Georges Banks and to their southern breeding and calving grounds off the southeastern U.S. (CETAP, 1982; Knowlton and Kraus, 2001; Knowlton *et al.*, 2022; Biedron *et al.*, 2009; DoC, 2016b). However, comparatively, the area is not known as an important area for feeding, breeding, or calving.

North Atlantic right whales range outside the Project Area for their main feeding, breeding, calving activities (Geo-Marine, 2010). Additional qualitative observations include animals feeding and socializing in New England waters, north of the NJ WEA (Quintana-Rizzo *et al.*, 2021). The North Atlantic right whales observed during the study period, north of the NJ WEA, were primarily concentrated in the northeastern and southeastern sections of the Massachusetts WEA (MA WEA) during the summer (June–August) and winter (December–February). North Atlantic right whale distribution did shift to the west into the Rhode Island/Massachusetts (RI/MA) WEA in the spring (March–May). Quintana-Rizzo *et al.* (2021) found that approximately 23 percent of the right whale population is present from December through May, and the mean residence time has tripled to an average of 13 days during these months. The NJ WEA is not in or near these areas important to feeding, breeding, and calving activities.

In general, North Atlantic right whales in the Project Area are expected to be engaging in migratory behavior. Given the species' migratory behavior in the Project Area, we anticipate individual whales would be typically migrating through the area during most months when foundation installation and UXO/MEC detonation would occur (given the seasonal restrictions on foundation installation and UXO/MEC detonation, rather than lingering for extended periods of time). Other work that involves either much smaller harassment zones (*e.g.*, HRG surveys) or is limited in amount (*e.g.*, cable landfill construction) may also occur during periods when North Atlantic right whales are using the habitat for migration. It is important to note the activities occurring from December through May that may impact North Atlantic right whale would be primarily HRG surveys and the nearshore cofferdam and goalpost installation and removal, which would not result in very high received levels. Across all years, if an individual were to be exposed during a subsequent year, the impact of that exposure is likely independent of the previous exposure given the duration between exposures.

As described in the Description of Marine Mammals in the Geographic Area section, North Atlantic right whales are presently experiencing an ongoing UME (beginning in June 2017). Preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of North Atlantic right whales. Given the current status of

the North Atlantic right whale, the loss of even one individual could significantly impact the population. No mortality, serious injury, or injury of North Atlantic right whales as a result of the project is expected or authorized. Any disturbance to North Atlantic right whales due to Ocean Wind's activities is expected to result in temporary avoidance of the immediate area of construction. As no injury, serious injury, or mortality is expected or authorized, and Level B harassment of North Atlantic right whales will be reduced to the level of least practicable adverse impact through use of mitigation measures, the authorized number of takes of North Atlantic right whales would not exacerbate or compound the effects of the ongoing UME.

As described in the general *Mysticetes* section above, foundation installation is likely to result in the highest amount of annual take and is of greatest concern given loud source levels. This activity would likely be limited to up to 116 days over a maximum of 2 years, during times when, based on the best available scientific data, North Atlantic right whales are less frequently encountered due to their migratory behavior. The potential types, severity, and magnitude of impacts are also anticipated to mirror that described in the general *Mysticetes* section above, including avoidance (the most likely outcome), changes in foraging or vocalization behavior, masking, a small amount of TTS, and temporary physiological impacts (e.g., change in respiration, change in heart rate). Importantly, the effects of the activities are expected to be sufficiently low-level and localized to specific areas as to not meaningfully impact important behaviors such as migratory behavior of North Atlantic right whales. These takes are expected to result in temporary behavioral reactions, such as slight displacement (but not abandonment) of migratory habitat or temporary cessation of feeding. Further, given these exposures are generally expected to occur to different individual right whales migrating through (i.e., many individuals would not be impacted on more than 1 day in a year), with some subset potentially being exposed on no more than a few days within the year, they are unlikely to result in energetic consequences that could affect reproduction or survival of any individuals.

Overall, NMFS expects that any behavioral harassment of North Atlantic right whales incidental to the specified activities would not result in changes to their migration patterns or foraging success, as only temporary avoidance of

an area during construction is expected to occur. As described previously, North Atlantic right whales migrating through the Project Area are not expected to remain in this habitat for extensive durations, and any temporarily displaced animals would be able to return to or continue to travel through and forage in these areas once activities have ceased.

Although acoustic masking may occur in the vicinity of the foundation installation activities, based on the acoustic characteristics of noise associated with pile driving (e.g., frequency spectra, short duration of exposure) and construction surveys (e.g., intermittent signals), NMFS expects masking effects to be minimal (e.g., impact pile driving) to none (e.g., HRG surveys). In addition, masking would likely only occur during the period of time that a North Atlantic right whale is in the relatively close vicinity of pile driving, which is expected to be intermittent within a day, and confined to the months in which North Atlantic right whales are at lower densities and primarily moving through the area, anticipated mitigation effectiveness, and likely avoidance behaviors. TTS is another potential form of Level B harassment that could result in brief periods of slightly reduced hearing sensitivity affecting behavioral patterns by making it more difficult to hear or interpret acoustic cues within the frequency range (and slightly above) of sound produced during impact pile driving; however, any TTS would likely be of low amount, limited duration, and limited to frequencies where most construction noise is centered (below 2 kHz). NMFS expects that right whale hearing sensitivity would return to pre-exposure levels shortly after migrating through the area or moving away from the sound source.

As described in the Potential Effects to Marine Mammals and Their Habitat section of the proposed rule, the distance of the receiver to the source influences the severity of response with greater distances typically eliciting less severe responses. NMFS recognizes North Atlantic right whales migrating could be pregnant females (in the fall) and cows with older calves (in spring) and that these animals may slightly alter their migration course in response to any foundation pile driving; however, as described in the Potential Effects to Marine Mammals and Their Habitat section of the proposed rule, we anticipate that course diversion would be of small magnitude. Hence, while some avoidance of the pile-driving activities may occur, we anticipate any avoidance behavior of migratory North

Atlantic right whales would be similar to that of gray whales (Tyack *et al.*, 1983), on the order of hundreds of meters up to 1 to 2 km. This diversion from a migratory path otherwise uninterrupted by the project's activities is not expected to result in meaningful energetic costs that would impact annual rates of recruitment of survival. NMFS expects that North Atlantic right whales would be able to avoid areas during periods of active noise production while not being forced out of this portion of their habitat.

North Atlantic right whale presence in the Project Area is year-round. However, abundance during summer months is lower compared to the winter months with spring and fall serving as "shoulder seasons" wherein abundance waxes (fall) or wanes (spring). Given this year-round habitat usage, in recognition that where and when whales may actually occur during project activities is unknown as it depends on the annual migratory behaviors, NMFS is requiring a suite of mitigation measures designed to reduce impacts to North Atlantic right whales to the maximum extent practicable. These mitigation measures (e.g., seasonal/daily work restrictions, vessel separation distances, reduced vessel speed) would not only avoid the likelihood of vessel strikes but also would minimize the severity of behavioral disruptions by minimizing impacts (e.g., through sound reduction using attenuation systems and reduced temporal overlap of project activities and North Atlantic right whales). This would further ensure that the number of takes by Level B harassment that are estimated to occur are not expected to affect reproductive success or survivorship by detrimental impacts to energy intake or cow/calf interactions during migratory transit. However, even in consideration of recent habitat-use and distribution shifts, Ocean Wind would still be installing foundations when the presence of North Atlantic right whales is expected to be lower.

As described in the Description of Marine Mammals in the Geographic Area section, Ocean Wind would be constructed within the North Atlantic right whale migratory corridor BIA, which represent areas and months within which a substantial portion of a species or population is known to migrate. The Lease Area is relatively small compared with the migratory BIA area (approximately 277 km² for OCS-A 0498 versus the size of the full North Atlantic right whale migratory BIA, 269,448 km²). Because of this, the overall North Atlantic right whale migration is not expected to be

impacted by the proposed activities. There are no known North Atlantic right whale feeding, breeding, or calving areas within the Project Area. Prey species are mobile (e.g., calanoid copepods can initiate rapid and directed escape responses) and are broadly distributed throughout the Project Area (noting again that North Atlantic right whale prey is not particularly concentrated in the Project Area relative to nearby habitats). Therefore, any impacts to prey that may occur are also unlikely to impact marine mammals.

The most significant measure to minimize impacts to individual North Atlantic right whales is the seasonal moratorium on all foundation installation activities from January 1 through April 30, and the limitation on these activities in December (e.g., only work with approval from NMFS), when North Atlantic right whale abundance in the Project Area is expected to be highest. NMFS also expects this measure to greatly reduce the potential for mother-calf pairs to be exposed to impact pile driving noise above the Level B harassment threshold during their annual spring migration through the Project Area from calving grounds to primary foraging grounds (e.g., Cape Cod Bay). UXO/MEC detonations would also be restricted from November 1 through April 30, annually. NMFS expects that exposures to North Atlantic right whales would be reduced due to the additional mitigation measures that would ensure that any exposures above the Level B harassment threshold would result in only short-term effects to individuals exposed.

Pile driving and UXO/MEC detonations may only begin in the absence of North Atlantic right whales (based on visual and passive acoustic monitoring). If pile driving or UXO/MEC detonations have commenced, NMFS anticipates North Atlantic right whales would avoid the area, utilizing nearby waters to carry on pre-exposure behaviors. However, foundation installation activities must be shut down if a North Atlantic right whale is sighted at any distance unless a shutdown is not feasible due to risk of injury or loss of life. Shutdown may occur anywhere if North Atlantic right whales are seen within or beyond the Level B harassment zone, further minimizing the duration and intensity of exposure. NMFS anticipates that if North Atlantic right whales go undetected and they are exposed to foundation installation or UXO/MEC detonation noise, it is unlikely a North Atlantic right whale would approach the sound source locations to the degree that they would purposely expose

themselves to very high noise levels. This is because typical observed whale behavior demonstrates likely avoidance of harassing levels of sound where possible (Richardson *et al.*, 1985). These measures are designed to avoid PTS and also reduce the severity of Level B harassment, including the potential for TTS. While some TTS could occur, given the mitigation measures (e.g., delay pile driving upon a sighting or acoustic detection and shutting down upon a sighting or acoustic detection), the potential for TTS to occur is low.

The clearance and shutdown measures are most effective when detection efficiency is maximized, as the measures are triggered by a sighting or acoustic detection. To maximize detection efficiency, NMFS requires the combination of PAM and visual observers. NMFS is requiring communication protocols with other project vessels, and other heightened awareness efforts (e.g., daily monitoring of North Atlantic right whale sighting databases) such that as a North Atlantic right whale approaches the source (and thereby could be exposed to higher noise energy levels), PSO detection efficacy would increase, the whale would be detected, and a delay to commencing foundation installation or shutdown (if feasible) would occur. In addition, the implementation of a soft-start for impact pile driving would provide an opportunity for whales to move away from the source if they are undetected, reducing received levels. The UXO/MEC detonations mitigation measures described above would further reduce the potential to be exposed to high received levels.

For HRG surveys, the maximum distance to the Level B harassment threshold is 141 m. The estimated take, by Level B harassment only, associated with HRG surveys is to account for any North Atlantic right whale sightings PSOs may miss when HRG acoustic sources are active. However, because of the short maximum distance to the Level B harassment threshold, the requirement that vessels maintain a distance of 500 m from any North Atlantic right whales, the fact that whales are unlikely to remain in close proximity to an HRG survey vessel for any length of time, and that the acoustic source would be shut down if a North Atlantic right whale is observed within 500 m of the source, any exposure to noise levels above the harassment threshold (if any) would be very brief. To further minimize exposures, ramp-up of sub-bottom profilers must be delayed during the clearance period if PSOs detect a North Atlantic right whale (or any other ESA-listed species)

within 500 m of the acoustic source. With implementation of the mitigation requirements, take by Level A harassment is unlikely and, therefore, not authorized. Potential impacts associated with Level B harassment would include low-level, temporary behavioral modifications, most likely in the form of avoidance behavior. Given the high level of precautions taken to minimize both the amount and intensity of Level B harassment on North Atlantic right whales, it is unlikely that the anticipated low-level exposures would lead to reduced reproductive success or survival.

As described above, no serious injury or mortality, or Level A harassment, of North Atlantic right whale is anticipated or allowed. Extensive North Atlantic right whale-specific mitigation measures (beyond the robust suite required for all species) are expected to further minimize the amount and severity of Level B harassment. Given the documented habitat use within the area, the majority of the individuals predicted taken (including no more than 14 instances of take, by Level B harassment only, over the course of the 5-year rule, with an annual maximum of no more than 7) would be impacted on only 1, or maybe 2, days in a year as North Atlantic right whales utilize this area for migration and would be transiting rather than residing in the area for extended periods of time; and, further, any impacts to North Atlantic right whales are expected to be in the form of lower-level behavioral disturbance. Given the magnitude and severity of the impacts discussed above, and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take (by Level B harassment only) anticipated and authorized would have a negligible impact on the North Atlantic right whale.

Blue Whale

The blue whale is listed as Endangered under the ESA, and the western North Atlantic stock is considered Depleted and Strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area, and there is no ongoing UME. The actual abundance of the stock is likely significantly greater than what is reflected in the SAR because the most recent population estimates are primarily based on surveys conducted in U.S. waters and the stock's range

extends well beyond the U.S. exclusive economic zone (EEZ). No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to four takes, by Level B harassment only, over the 5-year period. The maximum annual allowable take by Level B harassment, four, respectively (combined, this annual take ($n=4$) equates to approximately 0.97 percent of the stock abundance, if each take were considered to be of a different individual). Based on the migratory nature of blue whales and the fact that there are neither feeding nor reproductive areas documented in or near the Project Area, and in consideration of the very low number of predicted annual takes, it is unlikely that the predicted instances of takes would represent repeat takes of any individual—in other words, each take likely represents one whale exposed on 1 day within a year.

With respect to the severity of those individual takes by Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential TTS would be concentrated at half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of blue whales. Any hearing ability temporarily impaired from TTS is anticipated to return to pre-exposure conditions within a relatively short time period after the exposures cease. Any avoidance of the Project Area due to the activities would be expected to be temporary.

Given the magnitude and severity of the impacts discussed above and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by Level B harassment anticipated and authorized will have a negligible impact on the western North Atlantic stock of blue whales.

Fin Whale

The fin whale is listed as Endangered under the ESA, and the western North Atlantic stock is considered both Depleted and Strategic under the MMPA. No UME has been designated for this species or stock. No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to 30 takes, by harassment only, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 4 and 13, respectively (combined, this annual take ($n=17$) equates to approximately 0.25 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (e.g., years when only HRG surveys would be occurring). The Project Area does not overlap any known areas of specific biological importance to fin whales. It is likely that some subset of the individual whales exposed could be taken several times annually.

Level B harassment is expected to be in the form of behavioral disturbance, primarily resulting in avoidance of the Project Area where foundation installation is occurring, and some low-level TTS and masking that may limit the detection of acoustic cues for relatively brief periods of time. Any potential PTS would be minor (limited to a few dB) and any TTS would be of short duration and concentrated at half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of fin whales.

Fin whales are present in the waters off of New Jersey year round and are one of the most frequently observed large whales and cetaceans in continental shelf waters, principally from Cape Hatteras in the Mid-Atlantic northward to Nova Scotia, Canada (Sergeant, 1977; Sutcliffe and Brodie, 1977; CETAP, 1982; Hain *et al.*, 1992; Geo-Marine, 2010; BOEM 2012; Edwards *et al.*, 2015; Hayes *et al.*, 2022). Fin whales have high relative abundance in the Mid-Atlantic and Project Area, most observations occur in the winter and summer months (Geo-Marine, 2010; Hayes *et al.*, 2022) though detections do occur in spring and fall (Watkins *et al.*, 1987; Clark and Gagnon 2002; Geo-Marine, 2010; Morano *et al.*, 2012). However, fin whales typically feed in waters off of New England and within the Gulf of Maine, areas north of the Project Area, as New England and Gulf of St. Lawrence waters represent major feeding ground for fin whales (Hayes *et al.*, 2022). Hain *et al.* (1992), based on an analysis of neonate stranding data, suggested that calving takes place during October to January in latitudes of the U.S. mid-Atlantic region; however, it is unknown where calving, mating, and wintering occur for most of the population (Hayes *et al.*, 2022).

Given the documented habitat use within the area, some of the individuals taken would likely be exposed on multiple days. However, as described the project area does not include areas where fin whales are known to concentrate for feeding or reproductive behaviors and the predicted takes are expected to be in the form of lower-level impacts. Given the magnitude and severity of the impacts discussed above (including no more than 30 takes by harassment only over the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 4 and 13, respectively), and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the western North Atlantic stock of fin whales.

Humpback Whale

The West Indies DPS of humpback whales is not listed as threatened or endangered under the ESA, but the Gulf of Maine stock, which includes individuals from the West Indies DPS, is considered Strategic under the MMPA. However, as described in the Description of Marine Mammals in the Geographic Area section of this preamble, humpback whales along the Atlantic Coast have been experiencing an active UME as elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately 40 percent had evidence of human interaction (vessel strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts and take from vessel strike and entanglement is not authorized. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS of which the Gulf of Maine stock is a part) remains stable at approximately 12,000 individuals.

The rule authorizes up to 88 takes by harassment only over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 8 and 66, respectively (combined, this maximum annual take ($n=74$) equates to approximately 5.3 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the

years without foundation installation (e.g., years when only HRG surveys would be occurring). Given that humpback whales are known to forage off of New Jersey, it is likely that some subset of the individual whales exposed could be taken several times annually.

Among the activities analyzed, impact pile driving is likely to result in the highest amount of Level A harassment annual take (seven) of humpback whales. The maximum amount of annual take authorized, by Level B harassment, is highest for impact pile driving (n=60; WTGs plus OSS pin piles).

As described in the Description of Marine Mammals in the Geographic Area section, Humpback whales are known to occur regularly throughout the Mid-Atlantic Bight, including New Jersey waters, with strong seasonality where peak occurrences occur April to June (Barco *et al.*, 2002; Geo-Marine, 2010; Curtice *et al.*, 2019; Hayes *et al.*, 2022).

In the western North Atlantic, humpback whales feed during spring, summer, and fall over a geographic range encompassing the eastern coast of the U.S. Feeding is generally considered to be focused in areas north of the project area, including a feeding BIA in the Gulf of Maine/Stellwagen Bank/Great South Channel, 47,701, but has been documented farther south and off the coast of New Jersey. When foraging, humpback whales tend to remain in the area for extended durations to capitalize on the food sources.

Assuming humpback whales who are feeding in waters within or surrounding the Project Area behave similarly, we expect that the predicted instances of disturbance could be comprised of some individuals that may be exposed on multiple days if they are utilizing the area as foraging habitat. Also similar to other baleen whales, if migrating, such individuals would likely be exposed to noise levels from the project above the harassment thresholds only once during migration through the Project Area.

For all the reasons described in the *Mysticetes* section above, we anticipate any potential PTS and TTS would be concentrated at half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of baleen whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels relatively shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above.

Given the magnitude and severity of the impacts discussed above (including

no more than 88 takes over the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 8 and 66, respectively), and in consideration of the required mitigation measures and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Gulf of Maine stock of humpback whales.

Minke Whale

Minke whales are not listed under the ESA, and the Canadian East Coast stock is neither considered Depleted nor strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the Project Area. As described in the Description of Marine Mammals in the Geographic Area section, a UME has been designated for this species but is pending closure. No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to 141 takes, by harassment only, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 22 and 74, respectively (combined, this annual take (n=96) equates to approximately 0.44 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (e.g., years when only HRG surveys would be occurring). As described in the Description of Marine Mammals in the Geographic Area section, Minke whales are common offshore the U.S. Eastern Seaboard with a strong seasonal component in the continental shelf and in deeper, off-shelf waters (CETAP, 1982; Hayes *et al.*, 2022). In the Project area, minke whales are predominantly migratory and their known feeding areas are north, including a feeding BIA in the southwestern Gulf of Maine and George's Bank. Therefore, they would be more likely to be moving through (with each take representing a separate individual), though it is possible that some subset of the individual whales exposed could be taken up to a few times annually.

As described in the Description of Marine Mammals in the Geographic Area section, there is a UME for Minke whales, along the Atlantic coast from Maine through South Carolina, with

highest number of deaths in Massachusetts, Maine, and New York, and preliminary findings in several of the whales have shown evidence of human interactions or infectious diseases. However, we note that the population abundance is greater than 21,000 and the take authorized through this action is not expected to exacerbate the UME in any way.

We anticipate the impacts of this harassment to follow those described in the general *Mysticetes* section above. Any potential PTS would be minor (limited to a few dB) and any TTS would be of short duration and concentrated at half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of minke whales. Level B harassment would be temporary, with primary impacts being temporary displacement of the Project Area but not abandonment of any migratory or foraging behavior.

Given the magnitude and severity of the impacts discussed above (including no more than 141 takes of the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 22 and 74, respectively), and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Canadian Eastern Coastal stock of minke whales.

Sei Whale

Sei whales are listed as Endangered under the ESA, and the Nova Scotia stock is considered both Depleted and Strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the Project Area and no UME has been designated for this species or stock. No serious injury or mortality is anticipated or authorized for this species.

The rule authorizes up to seven takes, by harassment only, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be one and three, respectively (combined, this annual take (n=4) equates to approximately 0.6 percent of the stock abundance, if each take were considered to be of a different individual). As described in the Description of Marine Mammals in the Geographic Area section, most of the sei whale distribution is concentrated in

Canadian waters and seasonally in northerly U.S. waters, though they are uncommonly observed in the waters off of New Jersey. Because sei whales are migratory and their known feeding areas are east and north of the Project Area (e.g., there is a feeding BIA in the Gulf of Maine), they would be more likely to be moving through and, considering this and the very low number of total takes, it is unlikely that any individual would be exposed more than once within a given year.

With respect to the severity of those individual takes by behavioral Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential PTS and TTS would likely be concentrated at half or one octave above the frequency band of pile-driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of sei whales. Moreover, any TTS would be of a small degree. Any avoidance of the Project Area due to the Project's activities would be expected to be temporary.

Given the magnitude and severity of the impacts discussed above (including no more than seven takes of the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of one and three, respectively), and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Nova Scotia stock of sei whales.

Odontocetes

In this section, we include information here that applies to all of the odontocete species and stocks addressed below. Odontocetes include dolphins, porpoises, and all other whales possessing teeth, and we further divide them into the following subsections: sperm whales, small whales and dolphins, and harbor porpoise. These sub-sections include more specific information, as well as conclusions for each stock represented.

All of the takes of odontocetes authorized incidental to Ocean Wind's specified activities are by pile driving, UXO/MEC detonations, and HRG surveys. No serious injury or mortality is anticipated or proposed. We

anticipate that, given ranges of individuals (*i.e.*, that some individuals remain within a small area for some period of time), and non-migratory nature of some odontocetes in general (especially as compared to mysticetes), these takes are more likely to represent multiple exposures of a smaller number of individuals than is the case for mysticetes, though some takes may also represent one-time exposures to an individual. Foundation installation is likely to disturb odontocetes to the greatest extent, compared to UXO/MEC detonations and HRG surveys. While we expect animals to avoid the area during foundation installation and UXO/MEC detonations, their habitat range is extensive compared to the area ensonified during these activities. In addition, as described above, UXO/MEC detonations are instantaneous; therefore, any disturbance would be very limited in time.

As described earlier, Level B harassment may include direct disruptions in behavioral patterns (e.g., avoidance, changes in vocalizations (from masking) or foraging), as well as those associated with stress responses or TTS. Odontocetes are highly mobile species and similar to mysticetes, NMFS expects any avoidance behavior to be limited to the area near the sound source. While masking could occur during foundation installation, it would only occur in the vicinity of and during the duration of the activity, and would not generally occur in a frequency range that overlaps most odontocete communication or any echolocation signals. The mitigation measures (e.g., use of sound attenuation systems, implementation of clearance and shutdown zones) would also minimize received levels such that the severity of any behavioral response would be expected to be less than exposure to unmitigated noise exposure.

Any masking or TTS effects are anticipated to be of low-severity. First, the frequency range of pile driving, the most impactful activity proposed to be conducted in terms of response severity, falls within a portion of the frequency range of most odontocete vocalizations. However, odontocete vocalizations span a much wider range than the low frequency construction activities planned for the project. As described above, recent studies suggest odontocetes have a mechanism to self-mitigate (*i.e.*, reduce hearing sensitivity) the impacts of noise exposure, which could potentially reduce TTS impacts. Any masking or TTS is anticipated to be limited and would typically only interfere with communication within a portion of an odontocete's range and as

discussed earlier, the effects would only be expected to be of a short duration and, for TTS, a relatively small degree.

Furthermore, odontocete echolocation occurs predominantly at frequencies significantly higher than low frequency construction activities. Therefore, there is little likelihood that threshold shift would interfere with feeding behaviors. For HRG surveys, the sources operate at higher frequencies than foundation installation activities and UXO/MEC detonations. However, sounds from these sources attenuate very quickly in the water column, as described above. Therefore, any potential for PTS and TTS and masking is very limited. Further, odontocetes (e.g., common dolphins, spotted dolphins, bottlenose dolphins) have demonstrated an affinity to bow-ride actively surveying HRG surveys. Therefore, the severity of any harassment, if it does occur, is anticipated to be minimal based on the lack of avoidance previously demonstrated by these species.

The waters off the coast of New Jersey are used by several odontocete species. However, none except the sperm whale are listed under the ESA, and there are no known habitats of particular importance. In general, odontocete habitat ranges are far-reaching along the Atlantic coast of the U.S., and the waters off of New Jersey, including the Project Area, do not contain any particularly unique odontocete habitat features.

Sperm Whales

Sperm whales are listed as endangered under the ESA, and the North Atlantic stock is considered both Depleted and Strategic under the MMPA. The North Atlantic stock spans the East Coast out into oceanic waters well beyond the U.S. EEZ. Although listed as endangered, the primary threat faced by the sperm whale across its range (*i.e.*, commercial whaling) has been eliminated. Current potential threats to the species globally include vessel strikes, entanglement in fishing gear, anthropogenic noise, exposure to contaminants, climate change, and marine debris. There is no currently reported trend for the stock and, although the species is listed as endangered under the ESA, there are no specific issues with the status of the stock that cause particular concern (e.g., no UMEs). There are no known areas of biological importance (e.g., critical habitat or BIAs) in or near the Project Area. No mortality or serious injury is anticipated or authorized for this species.

The rule authorizes up to 24 takes, by Level B harassment only over the 5-year

period. The maximum annual allowable take by Level B harassment, would be 9, which equates to approximately 0.21 percent of the stock abundance, if each take were considered to be of a different individual), with lower numbers than that expected in the years without foundation installation (e.g., years when only HRG surveys would be occurring). Given sperm whale's preference for deeper waters, especially for feeding, it is unlikely that individuals will remain in the Project Area for multiple days, and therefore, the estimated takes likely represent exposures of different individuals on 1 day annually.

If sperm whales are present in the Project Area during any Project activities, they will likely be only transient visitors and not engaging in any significant behaviors. Further, the potential for TTS is low for reasons described in the general Odontocete section, but if it does occur, any hearing shift would be small and of a short duration. Because whales are not expected to be foraging in the Project Area, any TTS is not expected to interfere with foraging behavior.

Given the magnitude and severity of the impacts discussed above (including no more than 24 takes, by Level B harassment only, over the course of the 5-year rule, and a maximum annual allowable take of 9), and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the North Atlantic stock of sperm whales.

Dolphins and Small Whales (Including Delphinids)

The seven species and eight stocks included in this group (which are indicated in Table 2 in the *Delphinidae* family) are not listed under the ESA; however, short-finned pilot whales are listed as Strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area for any of these species and no UMEs have been designated for any of these species. No serious injury or mortality is anticipated or authorized for these species.

The seven delphinid species with takes authorized for the Project are Atlantic spotted dolphin, Atlantic white-sided dolphin, common bottlenose dolphin, common dolphin, long-finned pilot whale, short-finned pilot whale, and Risso's dolphin. The

rule would allow for the authorization of 90 to 4,308 takes (depending on species) by Level A harassment and Level B harassment, over the five-year period. The maximum annual allowable take for these species by Level A harassment and Level B harassment, would range from 0 to 11 and 30 to 1,584, respectively (this annual take equates to approximately 0.08 to 21.3 percent of the stock abundance, depending on each species, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (e.g., years when only HRG surveys would be occurring).

For the coastal stock of bottlenose dolphins, given the higher number of takes relative to the stock abundance, while some of the takes likely represent exposures of different individuals on 1 day a year, it is likely that some subset of the individuals exposed could be taken several times annually. For Atlantic spotted dolphin, Atlantic white-sided dolphin, common dolphin, the offshore stock of bottlenose dolphin, long- and short-finned pilot whale, and Risso's dolphin, given the number of takes, while many of the takes likely represent exposures of different individuals on 1 day a year, some subset of the individuals exposed could be taken up to a few times annually.

The number of takes, likely movement patterns of the affected species, and the intensity of any Level A or B harassments, combined with the availability of alternate nearby foraging habitat suggests that the likely impacts would not impact the reproduction or survival of any individuals. While delphinids may be taken on several occasions, none of these species are known to have small home ranges within the Project Area or known to be particularly sensitive to anthropogenic noise. The potential for PTS in dolphins and small whales is very low and, if PTS does occur, would occur to a limited number of individuals, be of small degree, and would be limited to the frequency ranges of the activity which does not span across most of their hearing range. Some TTS can also occur but, again, it would be limited to the frequency ranges of the activity and any loss of hearing sensitivity is anticipated to return to pre-exposure conditions shortly after the animals move away from the source or the source ceases.

Given the magnitude and severity of the impacts discussed above and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or

survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on all of the species and stocks addressed in this section.

Harbor Porpoises

Harbor porpoises are not listed as Threatened or Endangered under the ESA, and the Gulf of Maine/Bay of Fundy stock is neither considered depleted or strategic under the MMPA. The stock is found predominantly in northern U.S. coastal waters (less than 150 m depth) and up into Canada's Bay of Fundy (between New Brunswick and Nova Scotia). Although the population trend is not known, there are no UMEs or other factors that cause particular concern for this stock. No mortality or non-auditory injury are anticipated or authorized for this stock.

The rule would allow for the authorization of up to 608 takes, by harassment only, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 69 and 350, respectively (combined, this annual take (n=419) equates to approximately 0.44 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (e.g., years when only HRG surveys would be occurring). Given the number of takes, while many of the takes likely represent exposures of different individuals on 1 day a year, some subset of the individuals exposed could be taken up to a few times annually.

Regarding the severity of takes by Level B harassment, because harbor porpoises are particularly sensitive to noise, it is likely that a fair number of the responses could be of a moderate nature, particularly to pile driving. In response to pile driving, harbor porpoises are likely to avoid the area during construction, as previously demonstrated in Tougaard *et al.* (2009) in Denmark, in Dahne *et al.* (2013) in Germany, and in Vallejo *et al.* (2017) in the United Kingdom, although a study by Graham *et al.* (2019) may indicate that the avoidance distance could decrease over time. However, foundation installation is scheduled to occur off the coast of New Jersey and, given alternative foraging areas, any avoidance of the area by individuals is not likely to impact the reproduction or survival of any individuals. Given only 1 UXO/MEC would be detonated on any given day and only up to 10 UXO/MEC could be detonated under the LOA, any

behavioral response would be brief and of a low severity.

With respect to PTS and TTS, the effects on an individual are likely relatively low given the frequency bands of pile driving (most energy below 2 kHz) compared to harbor porpoise hearing (150 Hz to 160 kHz peaking around 40 kHz). Specifically, TTS is unlikely to impact hearing ability in their more sensitive hearing ranges, or the frequencies in which they communicate and echolocate. We expect any PTS that may occur to be within the very low end of their hearing range where harbor porpoises are not particularly sensitive and any PTS would be of small magnitude. As such, any PTS would not interfere with key foraging or reproductive strategies necessary for reproduction or survival.

As discussed in Hayes *et al.* (2022), Harbor porpoises are seasonally distributed. During fall (October through December) and spring (April through June), harbor porpoises are widely dispersed from New Jersey to Maine, with lower densities farther north and south. During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada. In non-summer months they have been seen from the coastline to deep waters (>1,800 m; Westgate *et al.*, 1998), although the majority are found over the continental shelf. While harbor porpoises are likely to avoid the area during any of the project's construction activities, as demonstrated during European wind farm construction, the time of year in which work would occur is when harbor porpoises are not in highest abundance, and any work that does occur would not result in the species' abandonment of the waters off of New Jersey.

Given the magnitude and severity of the impacts discussed above, and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on the Gulf of Maine/Bay of Fundy stock of harbor porpoises.

Phocids (Harbor Seals and Gray Seals)

The harbor seal and gray seal are not listed under the ESA, and neither the western North Atlantic stock of gray seal nor the western North Atlantic stock of harbor seal are considered depleted or

strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area. As described in the Description of Marine Mammals in the Geographic Area section, a UME has been designated for harbor seals and gray seals and is described further below. No serious injury or mortality is anticipated or authorized for this species.

For the two seal species, the rule authorizes up to between 649 and 1,749 takes for each species by harassment only over the 5-year period. The maximum annual allowable take for these species by Level A harassment and Level B harassment, would range from 31 to 35 and 305 to 844 (combined, this annual take (n=336 to 879) equates to approximately 1.23 to 1.43 percent of the stock abundance, if each take were considered to be of a different individual), with far lower numbers than that expected in the years without foundation installation (e.g., years when only HRG surveys would be occurring). Though gray seals and harbor seals are considered migratory and no specific feeding areas have been designated in the area, the higher number of takes relative to the stock abundance suggests that while some of the takes likely represent exposures of different individuals on 1 day a year, it is likely that some subset of the individuals exposed could be taken several times annually.

Harbor and gray seals occur in New Jersey waters most often from December through April, with harbor seal occurrences more common than gray seals (Reynolds, 2021). Seals are more likely to be close to shore (e.g., closer to the edge of the area ensnared above NMFS' harassment threshold), such that exposure to foundation installation would be expected to be at comparatively lower levels. Known haul-outs for seals occur near the coastal cofferdam and goal post locations (Oyster Creek, Island Beach State Park in Barnegat Bay, Farm Property, and BL England). However, based on the analysis conducted in Section 1.5.4 of Ocean Wind's ITA application (Figure 1–8), neither Ocean Wind nor NMFS expect the in-air sounds produced to cause take of hauled-out pinnipeds at distances greater than 541 m from the cofferdam installation/removal location (Ocean Wind, 2022b). As all documented pinniped haul-outs are located further than 541 m from each of the cofferdam locations, NMFS does not expect any harassment to occur and has not authorized any take from in-air impacts on hauled-out seals.

As described in the Potential Effects to Marine Mammals and Their Habitat

section in the proposed rule, construction of wind farms in Europe resulted in pinnipeds temporarily avoiding construction areas but returning within short time frames after construction was complete (Carroll *et al.*, 2010; Hamre *et al.*, 2011; Hastie *et al.*, 2015; Russell *et al.*, 2016; Brasseur *et al.*, 2010). Effects on pinnipeds that are taken by Level B harassment in the Project Area would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals would simply move away from the sound source and be temporarily displaced from those areas (Lucke *et al.*, 2006; Edren *et al.*, 2010; Skeate *et al.*, 2012; Russell *et al.*, 2016). Given the low anticipated magnitude of impacts from any given exposure (e.g., temporary avoidance), even repeated Level B harassment across a few days of some small subset of individuals, which could occur, is unlikely to result in impacts on the reproduction or survival of any individuals. Moreover, pinnipeds would benefit from the mitigation measures described in 50 CFR part 217—Regulations Governing the Taking and Importing of Marine Mammals Incidental to Specified Activities.

As described above, noise from pile driving is mainly low frequency and, while any PTS and TTS that does occur would fall within the lower end of pinniped hearing ranges (50 Hz to 86 kHz), PTS and TTS would not occur at frequencies around 5 kHz where pinniped hearing is most susceptible to noise-induced hearing loss (Kastelein *et al.*, 2018). In summary, any PTS and TTS would be of small degree and not occur across the entire, or even most sensitive, hearing range. Hence, any impacts from PTS and TTS are likely to be of low severity and not interfere with behaviors critical to reproduction or survival.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and occurred across Maine, New Hampshire, and Massachusetts until 2020. Based on tests conducted so far, the main pathogen found in the seals belonging to that UME was phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. Currently, the only active UME is occurring in Maine with some harbor and gray seals testing positive for highly pathogenic avian influenza (HPAI) H5N1. Although elevated strandings continue, neither UME (alone or in combination) provide cause for concern regarding population-level impacts to any of these stocks. For

harbor seals, the population abundance is over 61,000 and annual mortality/serious injury (M/SI) ($n=339$) is well below PBR (1,729) (Hayes *et al.*, 2020). The population abundance for gray seals in the United States is over 27,000, with an estimated overall abundance, including seals in Canada, of approximately 450,000. In addition, the abundance of gray seals is likely increasing in the U.S. Atlantic, as well as in Canada (Hayes *et al.*, 2020).

Given the magnitude and severity of the impacts discussed above, and in consideration of the required mitigation and other information presented, Ocean Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have determined that the take by harassment anticipated and authorized will have a negligible impact on harbor and gray seals.

Negligible Impact Determination

No mortality or serious injury is anticipated to occur or authorized. As described in the analysis above, the impacts resulting from the project's activities cannot be reasonably expected to, and are not reasonably likely to, adversely affect any of the species or stocks through effects on annual rates of recruitment or survival. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required mitigation and monitoring measures, NMFS finds that the marine mammal take from all of Ocean Wind's specified activities combined will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals estimated to be taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the

analysis, such as the temporal or spatial scale of the activities.

NMFS is authorizing incidental take by Level A harassment and/or Level B harassment of 17 species of marine mammals (with 18 managed stocks). The maximum number of instances of takes by combined Level A harassment and Level B harassment possible within any 1 year relative to the best available population abundance is less than one-third for all species and stocks potentially impacted.

For 16 stocks, less than 3 percent of the stock abundance is authorized for take by harassment; for 1 stock, less than 6 percent of the stock abundance is authorized for take by harassment; and for one stock, less than 22 percent of the stock abundance is authorized for take by harassment. Specific to the North Atlantic right whale, the maximum amount of take, which is by Level B harassment only, is seven, or 2.1 percent of the stock abundance, assuming that each instance of take represents a different individual. Please see Table 35 for information relating to this small numbers analysis.

Based on the analysis contained herein of the activities (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Classification

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the promulgation of rulemakings, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the NOAA GARFO.

The NMFS Office of Protected Resources has authorized the take of five marine mammal species, which are listed under the ESA: the North Atlantic right, sei, fin, blue, and sperm whale. The Permit and Conservation Division requested initiation of section 7 consultation on September 12, 2022 with GARFO for the promulgation of the rulemaking. NMFS issued a Biological Opinion on April 3, 2023 concluding that the promulgation of the rule and issuance of LOAs thereunder is not likely to jeopardize the continued existence of threatened and endangered species under NMFS' jurisdiction and is not likely to result in the destruction or adverse modification of designated or proposed critical habitat. The Biological Opinion is available at <https://repository.library.noaa.gov/view/noaa/49689>.

The promulgated regulations, as well as requiring the applicant to abide by the reasonable and prudent measure and terms and conditions of the Biological Opinion and Incidental Take Statement, as issued by NMFS.

National Environmental Policy Act (NEPA)

To comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must evaluate our proposed action (*i.e.*, promulgation of regulation) and alternatives with respect to potential impacts on the human environment. NMFS participated as a cooperating agency on the BOEM 2023 Final Environmental Impact Statement (FEIS), which was finalized on July 3, 2023, and is available at <https://www.boem.gov/renewable-energy/state-activities/ocean-wind-1>. In accordance with 40 CFR 1506.3, NMFS independently reviewed and evaluated the 2023 Ocean Wind 1 FEIS and determined that it is adequate and sufficient to meet our responsibilities under NEPA for the promulgation of this rule and issuance of the associated LOA. NMFS, therefore, has adopted the 2023 Ocean Wind 1 FEIS through a joint Record of Decision (ROD) with BOEM. The joint ROD for adoption of the 2023 Ocean Wind 1 FEIS and promulgation of this final rule and subsequent issuance of a LOA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

Executive Order 12866

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOA, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS.

Coastal Zone Management Act (CZMA)

The Coastal Zone Management Act requires that any applicant for a required federal license or permit to conduct an activity, within the coastal zone or within the geographic location descriptions (*i.e.*, areas outside the coastal zone in which an activity would have reasonably foreseeable coastal effects), affecting any land or water use or natural resource of the coastal zone be consistent with the enforceable policies of a state's federally approved coastal management program. NMFS determined that Ocean Wind's application for an incidental take regulations is an unlisted activity and, thus, is not subject to Federal consistency requirements in the absence of the receipt and prior approval of an unlisted activity review request from the state by the Director of NOAA's Office for Coastal Management. Pursuant to 15 CFR 930.54, NMFS published notice of receipt of Ocean Wind's application in the **Federal Register** on March 7, 2022 (87 FR 12666) and published notice of the proposed rule on October 26, 2022 (87 FR 65868). The state of New Jersey did not request approval from the

Director of NOAA's Office for Coastal Management to review Ocean Wind's application as an unlisted activity, and the time period for making such request has expired. Therefore, NMFS has determined the incidental take authorization is not subject to Federal consistency review.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Endangered and threatened species, Fish, Fisheries, Marine mammals, Penalties, Reporting and recordkeeping requirements, Wildlife.

Dated: September 1, 2023.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, NMFS amends 50 CFR part 217 to read as follows:

PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Add subpart AA, consisting of §§ 217.260 through 217.269, to read as follows:

Subpart AA—Taking Marine Mammals Incidental to Construction of the Ocean Wind 1 Project Offshore of New Jersey

Sec.

- 217.260 Specified activity and specified geographical region.
- 217.261 Effective dates.
- 217.262 Permissible methods of taking.
- 217.263 Prohibitions.
- 217.264 Mitigation requirements.
- 217.265 Monitoring and reporting requirements.
- 217.266 Letter of Authorization.
- 217.267 Modifications of Letter of Authorization.
- 217.268–217.269 [Reserved]

Subpart AA—Taking Marine Mammals Incidental to Construction of the Ocean Wind 1 Project Offshore of New Jersey

§ 217.260 Specified activity and specified geographical region.

(a) Regulations in this subpart apply to activities associated with the Ocean Wind 1 project (hereafter referred to as the “Project”) by Ocean Wind, LLC (hereafter referred to as “LOA Holder”), and those persons it authorizes or funds to conduct activities on its behalf in the area outlined in paragraph (b) of this

section. Requirements imposed on LOA Holder must be implemented by those persons it authorizes or funds to conduct activities on its behalf.

(b) The specified geographical region is the Mid-Atlantic Bight, which includes, but is not limited to, the Bureau of Ocean Energy Management (BOEM) Lease Area Outer Continental Shelf (OCS)-A 0498 Commercial Lease of Submerged Lands for Renewable Energy Development, two export cable routes, and two sea-to-shore transition points located in New Jersey at Oyster Creek, Island Beach State Park in Barnegat Bay, Farm Property, and BL England.

(c) The specified activities are impact pile driving of wind turbine generator (WTGs) and offshore substation (OSSs) foundations; vibratory pile driving (install and subsequently remove) of cofferdams and goal posts; high-resolution geophysical (HRG) site characterization surveys; unexploded ordnances or munitions and explosives of concern (UXOs/MECs) detonation; vessel transit within the specified geographical region to transport crew, supplies, and materials; WTG operation; fishery and ecological monitoring surveys; placement of scour protection; and trenching, laying, and burial activities associated with the installation of the export cable route from OSSs to shore-based converter stations and inter-array cables between turbines.

§ 217.261 Effective dates.

The regulations in this subpart are effective from October 13, 2023, through October 12, 2028.

§ 217.262 Permissible methods of taking.

Under the LOA, issued pursuant to §§ 216.106 and 217.266, LOA Holder, and those persons it authorizes or funds to conduct activities on its behalf, may incidentally, but not intentionally, take marine mammals within the vicinity of BOEM Lease Area OCS-A 0498 Commercial Lease of Submerged Lands for Renewable Energy Development, along export cable routes, and at the two sea-to-shore transition points located in New Jersey at Oyster Creek, Island Beach State Park in Barnegat Bay, Farm Property, and BL England in the following ways, provided LOA Holder is in complete compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA:

(a) By Level B harassment associated with the acoustic disturbance of marine mammals by impact pile driving (WTG and OSS foundation installation), vibratory pile driving (cofferdam and

goal post installation and removal), UXO/MEC detonations, and HRG site characterization surveys;

(b) By Level A harassment associated with the acoustic disturbance of marine mammals by impact pile driving of

WTG and OSS foundations and UXO/MEC detonations;

(c) Take by mortality or serious injury of any marine mammal species is not authorized; and

(d) The incidental take of marine mammals by the activities listed in paragraphs (a) and (b) of this section is limited to the following species:

TABLE 1 TO PARAGRAPH (d)

Marine mammal species	Scientific name	Stock
North Atlantic right whale	<i>Eubalaena glacialis</i>	Western Atlantic.
Blue whale	<i>Balaenoptera musculus</i>	Western North Atlantic.
Fin whale	<i>Balaenoptera physalus</i>	Western North Atlantic.
Humpback whale	<i>Megaptera novaeangliae</i>	Gulf of Maine.
Minke whale	<i>Balaenoptera acutorostrata</i>	Canadian Eastern Coastal.
Sei whale	<i>Balaenoptera borealis</i>	Nova Scotia.
Sperm whale	<i>Physeter macrocephalus</i>	North Atlantic.
Atlantic spotted dolphin	<i>Stenella frontalis</i>	Western North Atlantic.
Atlantic white-sided dolphin	<i>Lagenorhynchus acutus</i>	Western North Atlantic.
Bottlenose dolphin	<i>Tursiops truncatus</i>	Western North Atlantic—Offshore.
Common dolphin	<i>Delphinus delphis</i>	Northern Migratory Coastal.
Long-finned pilot whale	<i>Globicephala melas</i>	Western North Atlantic.
Short-finned pilot whale	<i>Globicephala macrorhynchus</i>	Western North Atlantic.
Risso's dolphin	<i>Grampus griseus</i>	Western North Atlantic.
Harbor porpoise	<i>Phocoena phocoena</i>	Gulf of Maine/Bay of Fundy.
Gray seal	<i>Halichoerus grypus</i>	Western North Atlantic.
Harbor seal	<i>Phoca vitulina</i>	Western North Atlantic.

§ 217.263 Prohibitions.

Except for the takings described in § 217.262 and authorized by an LOA issued under §§ 217.266 or 217.267, it is unlawful for any person to do any of the following in connection with the activities described in this subpart:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 217.266 and 217.267;

(b) Take any marine mammal not specified in § 217.262(d);

(c) Take any marine mammal specified in the LOA in any manner other than as specified in the LOA; or

(d) Take any marine mammal specified in § 217.262(d), after NMFS Office of Protected Resources determines such taking results in more than a negligible impact on the species or stocks of such marine mammals.

§ 217.264 Mitigation requirements.

When conducting the activities identified in § 217.260(c) within the area described in § 217.260(b), LOA Holder must implement the mitigation measures contained in this section and any LOA issued under §§ 217.266 and 217.267. These mitigation measures include, but are not limited to:

(a) *General conditions.* LOA Holder must comply with the following general measures:

(1) A copy of any issued LOA must be in the possession of LOA Holder and its designees, all vessel operators, visual protected species observers (PSOs), passive acoustic monitoring (PAM)

operators, pile driver operators, and any other relevant designees operating under the authority of the issued LOA;

(2) LOA Holder must conduct training for construction, survey, and vessel personnel and the marine mammal monitoring team (PSO and PAM operators) prior to the start of all in-water construction activities in order to explain responsibilities, communication procedures, marine mammal detection and identification, mitigation, monitoring, and reporting requirements, safety and operational procedures, and authorities of the marine mammal monitoring team(s). This training must be repeated for new personnel who join the work during the project. A description of the training program must be provided to NMFS at least 60 days prior to the initial training before in-water activities begin. Confirmation of all required training must be documented on a training course log sheet and reported to NMFS Office of Protected Resources prior to initiating project activities;

(3) Prior to and when conducting any in-water activities and vessel operations, LOA Holder personnel and contractors (e.g., vessel operators, PSOs) must use available sources of information on North Atlantic right whale presence in or near the Project Area including daily monitoring of the Right Whale Sightings Advisory System, and monitoring of U.S. Coast Guard VHF Channel 16 throughout the day to receive notification of any sightings

and/or information associated with any Slow Zones (i.e., Dynamic Management Areas (DMAs) and/or acoustically-triggered slow zones) to provide situational awareness for both vessel operators, PSO(s), and PAM operator(s); The marine mammal monitoring team must monitor these systems no less than every 4 hours. For any UXO/MEC detonation, these systems must be monitored for 24 hours and immediately prior to blasting;

(4) Any marine mammal observed by project personnel must be immediately communicated to any on-duty PSOs, PAM operator(s), and all vessel captains. Any large whale observation or acoustic detection by PSOs or PAM operators must be conveyed to all vessel captains;

(5) For North Atlantic right whales, any visual or acoustic detection must trigger a delay to the commencement of pile driving, UXO/MEC detonation, and HRG surveys.

(6) In the event that a large whale is sighted or acoustically detected that cannot be confirmed as a non-North Atlantic right whale, it must be treated as if it were a North Atlantic right whale for purposes of mitigation;

(7) If a delay to commencing an activity is called for by the Lead PSO or PAM operator, LOA Holder must take the required mitigative action. If a shutdown of an activity is called for by the Lead PSO or PAM operator, LOA Holder must take the required mitigative action unless shutdown would result in

imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. Any disagreements between the Lead PSO, PAM operator, and the activity operator regarding delays or shutdowns would only be discussed after the mitigative action has occurred;

(8) If an individual from a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized take number has been met, is observed entering or within the relevant Level B harassment zone prior to beginning a specified activity, the activity must be delayed. If the activity is ongoing, it must be shut down immediately, unless shutdown would result in imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. The activity must not commence or resume until the animal(s) has been confirmed to have left and is on a path away from the Level B harassment zone or after 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species with no further sightings;

(9) For in-water construction heavy machinery activities listed in § 217.260(c), if a marine mammal is on a path towards or comes within 10 meters (m) (32.8 feet) of equipment, LOA Holder must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment;

(10) All vessels must be equipped with a properly installed, operational Automatic Identification System (AIS) device and LOA Holder must report all Maritime Mobile Service Identify (MMSI) numbers to NMFS Office of Protected Resources;

(11) By accepting the issued LOA, LOA Holder consents to on-site observation and inspections by Federal agency personnel (including NOAA personnel) during activities described in this subpart, for the purposes of evaluating the implementation and effectiveness of measures contained within the LOA and this subpart; and

(12) It is prohibited to assault, harm, harass (including sexually harass), oppose, impede, intimidate, impair, or in any way influence or interfere with a PSO, PAM Operator, or vessel crew member acting as an observer, or attempt the same. This prohibition includes, but is not limited to, any action that interferes with an observer's responsibilities, or that creates an intimidating, hostile, or offensive environment. Personnel may report any violations to the NMFS Office of Law Enforcement.

(b) *Vessel strike avoidance measures.* LOA Holder must comply with the following vessel strike avoidance measures, unless an emergency situation presents a threat to the health, safety, or life of a person or when a vessel, actively engaged in emergency rescue or response duties, including vessel-in-distress or environmental crisis response, requires speeds in excess of 10 kn to fulfill those responsibilities, while in the specified geographical region:

(1) Prior to the start of the Project's activities involving vessels, LOA Holder must receive a protected species training that covers, at a minimum, identification of marine mammals that have the potential to occur where vessels would be operating; detection observation methods in both good weather conditions (*i.e.*, clear visibility, low winds, low sea states) and bad weather conditions (*i.e.*, fog, high winds, high sea states, with glare); sighting communication protocols; all vessel speed and approach limit mitigation requirements (*e.g.*, vessel strike avoidance measures); and information and resources available to the project personnel regarding the applicability of Federal laws and regulations for protected species. This training must be repeated for any new vessel personnel who join the Project. Confirmation of the observers' training and understanding of the Incidental Take Authorization (ITA) requirements must be documented on a training course log sheet and reported to NMFS;

(2) LOA Holder's vessels, regardless of their vessel's size, must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course to avoid striking any marine mammal;

(3) LOA Holder's underway vessels (*e.g.*, transiting, surveying) operating at any speed must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180° direction of the forward path of the vessel (90° port to 90° starboard) located at an appropriate vantage point for ensuring vessels are maintaining appropriate separation distances. Visual observers must be equipped with alternative monitoring technology (*e.g.*, night vision devices, infrared cameras) for periods of low visibility (*e.g.*, darkness, rain, fog, *etc.*). The dedicated visual observer must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements in this subpart. Visual observers may be third-party observers (*i.e.*, NMFS-

approved PSOs) or trained crew members, as defined in (b)(1) of this subsection.

(4) LOA Holder must continuously monitor the U.S. Coast Guard VHF Channel 16 at the onset of transiting through the duration of transiting, over which North Atlantic right whale sightings are broadcasted. At the onset of transiting and at least once every 4 hours, vessel operators and/or trained crew member(s) must also monitor the project's Situational Awareness System, WhaleAlert, and relevant NOAA information systems such as the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales;

(5) All LOA Holder's vessels must transit at 10 kn or less within any active North Atlantic right whale Slow Zone (*i.e.*, Dynamic Management Areas (DMAs) or acoustically-triggered slow zone);

(6) All LOA Holder's vessels, regardless of size, must immediately reduce speed to 10 kn or less for at least 24 hours when a North Atlantic right whale is sighted at any distance by any project-related personnel or acoustically detected by any project-related PAM system. Each subsequent observation or acoustic detection in the Project area shall trigger an additional 24-hour period. If a North Atlantic right whale is reported via any of the monitoring systems (refer back to paragraph (b)(4) of this section) within 10 kilometers (km; 6.2 miles (mi)) of a transiting vessel(s), that vessel must operate at 10 knots (kn; 11.5 miles per hour (mph)) or less for 24 hours following the reported detection;

(7) LOA Holder's vessels, regardless of size, must immediately reduce speed to 10 kn or less when any large whale (other than a North Atlantic right whale) is observed within 500 meters (m; 1,640 feet (ft)) of an underway vessel;

(8) If LOA Holder's vessel(s) are traveling at speeds greater than 10 kn (*i.e.*, no speed restrictions are enacted) in a transit corridor from a port to the Lease Area, in addition to the required dedicated visual observer, LOA Holder must monitor the transit corridor in real-time with PAM prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all crew transfer vessels must travel at 10 kn or less for 24 hours following the detection. Each subsequent detection shall trigger a 24-hour reset. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection in the transit corridor in the past 24 hours;

(9) LOA Holder's vessels must maintain a minimum separation

distance of 500 m from North Atlantic right whales. If underway, all vessels must steer a course away from any sighted North Atlantic right whale at 10 kn or less such that the 500-m minimum separation distance requirement is not violated. If a North Atlantic right whale is sighted within 500 m of an underway vessel, that vessel must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale and take the vessel strike avoidance measures described in this paragraph (b)(9) of this section;

(10) LOA Holder's vessels must maintain a minimum separation distance of 100 m (328 ft) from sperm whales and non-North Atlantic right whale baleen whales. If one of these species is sighted within 100 m of a transiting vessel, LOA Holder's vessel must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 100 m;

(11) LOA Holder's vessels must maintain a minimum separation distance of 50 m (164 ft) from all delphinoid cetaceans and pinnipeds with an exception made for those that approach the vessel (*i.e.*, bow-riding dolphins). If a delphinid cetacean or pinniped is sighted within 50 m of a transiting vessel, LOA Holder's vessel must shift the engine to neutral, with an exception made for those that approach the vessel (*e.g.*, bow-riding dolphins). Engines must not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m;

(12) When a marine mammal(s) is sighted while LOA Holder's vessel(s) is transiting, the vessel must take action as necessary to avoid violating the relevant separation distances (*e.g.*, attempt to remain parallel to the animal's course, slow down, and avoid abrupt changes in direction until the animal has left the area). This measure does not apply to any vessel towing gear or any situation where respecting the relevant separation distance would be unsafe (*i.e.*, any situation where the vessel is navigationally constrained);

(13) LOA Holder's vessels underway must not divert or alter course to approach any marine mammal. If a separation distance is triggered, any vessel underway must avoid abrupt changes in course direction and transit at 10 kn or less until the animal is outside the relevant separation distance;

(14) LOA Holder is required to abide by other speed and approach regulations. Nothing in this subpart exempts vessels from any other applicable marine mammal speed and approach regulations;

(15) LOA Holder must check, daily, for information regarding the establishment of mandatory or voluntary vessel strike avoidance areas (*i.e.*, DMAs, SMAs, Slow Zones) and any information regarding North Atlantic right whale sighting locations;

(16) LOA Holder must submit a North Atlantic Right Whale Vessel Strike Avoidance Plan to NMFS Office of Protected Resources for review and approval at least 90 days prior to the planned start of vessel activity. The plan must provide details on the vessel-based observer and PAM protocols for transiting vessels. If a plan is not submitted or approved by NMFS prior to vessel operations, all project vessels transiting, year round, must travel at speeds of 10-kn or less. LOA Holder must comply with any approved North Atlantic Right Whale Vessel Strike Avoidance Plan; and

(17) Speed over ground will be used to measure all vessel speed restrictions.

(c) *WTG and OSS foundation installation.* The following requirements apply to impact pile driving activities associated with the installation of WTG and OSS foundations:

(1) Impact pile driving must not occur January 1 through April 30. Impact pile driving must be avoided to the maximum extent practicable in December; however, it may occur if necessary to complete the project with prior approval by NMFS;

(2) Monopiles must be no larger than 11 m in diameter, representing the larger end of the monopile design. During all monopile installation, the minimum amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Hammer energies must not exceed 4,000 kilojoules for monopile installation. No more than two monopiles may be installed per day. Pin piles must be no larger than 5 m in diameter. During all pin pile installation, the minimum amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Hammer energies must not exceed 2,500 kJ for pin pile installation. No more than three pin piles may be installed per day;

(3) LOA Holder may initiate impact pile driving during hours of darkness only from June 1 to October 31, annually, in accordance with a NMFS-approved Alternative Monitoring Plan for Nighttime Pile Driving;

(4) For the construction months of May and November (as well as December, if approval is granted by NMFS), impact pile driving must only be initiated during daylight hours, defined as no later than 1.5 hours prior to civil sunset and no earlier than 1 hour after civil sunrise, and would only be allowed to continue into darkness if stopping operations represents a risk to human health, safety, and/or pile stability;

(5) LOA Holder must utilize a soft-start protocol for each impact pile driving event of all foundations by performing four to six strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes;

(6) Soft-start must occur at the beginning of impact driving and at any time following a cessation of impact pile driving of 30 minutes or longer;

(7) LOA Holder must establish clearance and shutdown zones, which must be measured using the radial distance around the pile being driven. If a marine mammal is detected within or about to enter the applicable clearance zones, prior to the beginning of soft-start procedures, impact pile driving must be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings. The specific time periods are 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species;

(8) For North Atlantic right whales, any visual observation or acoustic detection must trigger a delay to the commencement of pile driving. The clearance zone may only be declared clear if no North Atlantic right whale acoustic or visual detections have occurred within the clearance zone during the 60-minute monitoring period;

(9) LOA Holder must deploy at least two functional noise abatement systems that reduce noise levels to the modeled harassment isopleths, assuming 10-dB attenuation, during all impact pile driving;

(i) A single bubble curtain must not be used;

(ii) Any bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 m³/(minute*m). The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must adjust the air supply and operating pressure such that the maximum possible sound attenuation

performance of the bubble curtain(s) is achieved;

(iii) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(iv) No parts of the ring or other objects may prevent full seafloor contact with a bubble curtain ring;

(v) Construction contractors must train personnel in the proper balancing of airflow to the bubble curtain ring. LOA Holder must provide NMFS Office of Protected Resources with a bubble curtain performance test and maintenance report to review within 72 hours after each pile using a bubble curtain is installed. Additionally, a full maintenance check (e.g., manually clearing holes) must occur prior to each pile being installed;

(vi) Corrections to the bubble ring(s) to meet the performance standards in this paragraph (c)(9) must occur prior to impact pile driving of monopiles. If LOA Holder uses a noise mitigation device in addition to the bubble curtain, LOA Holder must maintain similar quality control measures as described in this paragraph (c)(9).

(10) LOA Holder must utilize NMFS-approved PAM systems, as described in paragraph(c)(17) of this section. The PAM system components (*i.e.*, acoustic buoys) must not be placed closer than 1 km to the pile being driven so that the activities do not mask the PAM system. LOA Holder must provide an adequate demonstration of and justification for the detection range of the system they plan to deploy while considering potential masking from concurrent pile-driving and vessel noise. The PAM system must be able to detect a vocalization of North Atlantic right whales up to 10 km (6.2 mi).

(11) LOA Holder must utilize PSO(s) and PAM operator(s), as described in § 217.265(c). At least three on-duty PSOs must be on the pile driving platform. Additionally, two dedicated-PSO vessels must be used at least 60 minutes before, during, and 30 minutes after all pile driving, and each dedicated-PSO vessel must have at least three PSOs on duty during these time periods. LOA Holder may request NMFS approval to use alternative technology (e.g., drones) in lieu of one or two of the dedicated PSO vessels that provide similar marine mammal detection capabilities.

(12) If a marine mammal is detected (visually or acoustically) entering or within the respective shutdown zone after pile driving has begun, the PSO or PAM operator must call for a shutdown

of pile driving and LOA Holder must stop pile driving immediately, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals, or the lead engineer determines there is pile refusal or pile instability. If pile driving is not shutdown in one of these situations, LOA Holder must reduce hammer energy to the lowest level practicable and the reason(s) for not shutting down must be documented and reported to NMFS Office of Protected Resources within the applicable monitoring reports (e.g., weekly, monthly).

(13) A visual observation or acoustic detection of a North Atlantic right whale at any distance triggers shutdown requirements under paragraph (c)(12) of this section. If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale has neither been visually or acoustically detected for 30 minutes;

(14) If pile driving has been shut down due to the presence of a marine mammal other than a North Atlantic right whale, pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time LOA Holder must use the lowest hammer energy practicable to maintain stability;

(15) LOA Holder must conduct sound field verification (SFV) measurements during pile driving activities associated with the installation of, at minimum, the first three monopile foundations. SFV measurements must continue until at least three consecutive piles demonstrate noise levels are at or below those modeled, assuming 10 decibels (dB) of attenuation. Subsequent SFV measurements are also required should larger piles be installed or if additional piles are driven that may produce louder sound fields than those previously measured (e.g., higher hammer energy, greater number of strikes, *etc.*). SFV measurements must be conducted as follows:

(i) Measurements must be made at a minimum of four distances from the pile(s) being driven, along a single transect, in the direction of lowest

transmission loss (*i.e.*, projected lowest transmission loss coefficient), including, but not limited to, 750 m (2,460 ft) and three additional ranges selected such that measurement of Level A harassment and Level B harassment isopleths are accurate, feasible, and avoids extrapolation. At least one additional measurement at an azimuth 90 degrees from the array at 750 m must be made. At each location, there must be a near bottom and mid-water column hydrophone (measurement systems);

(ii) The recordings must be continuous throughout the duration of all pile driving of each foundation;

(iii) The SFV measurement systems must have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile. The frequency range of SFV measurement systems must cover the range of at least 20 hertz (Hz) to 20 kilohertz (kHz). The SFV measurement systems must be designed to have omnidirectional sensitivity so that the broadband received level of all pile driving exceeds the system noise floor by at least 10 dB. The dynamic range of the SFV measurement system must be sufficient such that at each location, and the signals avoid poor signal-to-noise ratios for low amplitude signals and avoid clipping, nonlinearity, and saturation for high amplitude signals;

(iv) All hydrophones used in SFV measurements systems are required to have undergone a full system, traceable laboratory calibration conforming to International Electrotechnical Commission (IEC) 60565, or an equivalent standard procedure, from a factory or accredited source to ensure the hydrophone receives accurate sound levels, at a date not to exceed 2 years before deployment. Additional *in-situ* calibration checks using a pistonphone are required to be performed before and after each hydrophone deployment. If the measurement system employs filters via hardware or software (e.g., high-pass, low-pass, *etc.*), which is not already accounted for by the calibration, the filter performance (*i.e.*, the filter's frequency response) must be known, reported, and the data corrected before analysis.

(v) LOA Holder must be prepared with additional equipment (hydrophones, recording devices, hydrophone calibrators, cables, batteries, *etc.*), which exceeds the amount of equipment necessary to perform the measurements, such that technical issues can be mitigated before measurement;

(vi) LOA Holder must submit 48-hour interim reports after each foundation is

measured (see § 217.265(g) section for interim and final reporting requirements);

(vii) LOA Holder must not exceed modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds, assuming 10-dB attenuation, for foundation installation. If any of the interim SFV measurement reports submitted for the first three monopiles indicate the modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds assuming 10-dB attenuation, then LOA Holder must implement additional sound attenuation measures on all subsequent foundations. LOA Holder must also increase clearance and shutdown zone sizes to those identified by NMFS until SFV measurements on at least three additional foundations demonstrate acoustic distances to harassment thresholds meet or are less than those modeled assuming 10-dB of attenuation. LOA Holder must optimize the sound attenuation systems (e.g., ensure hose maintenance, pressure testing, *etc.*) to meet noise levels modeled, assuming 10-dB attenuation, within three piles or else foundation installation activities must cease until NMFS and LOA Holder can evaluate the situation and ensure future piles must not exceed noise levels modeled assuming 10-dB attenuation;

(viii) If, after additional measurements conducted pursuant to requirements of paragraph (15)(vii) of this section, acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10-dB attenuation), LOA Holder may request to NMFS Office of Protected Resources a modification of the clearance and shutdown zones. For NMFS Office of Protected Resources to consider a modification request for reduced zone sizes, LOA Holder must have conducted SFV measurements on an additional three foundations and ensure that subsequent foundations would be installed under conditions that are predicted to produce smaller harassment zones than those modeled assuming 10-dB of attenuation;

(ix) LOA Holder must conduct SFV measurements upon commencement of turbine operations to estimate turbine operational source levels, in accordance with a NMFS-approved Foundation Installation Pile Driving SFV Plan. SFV must be conducted in the same manner as previously described in paragraph (c)(15) of this section, with appropriate adjustments to measurement distances, number of hydrophones, and

hydrophone sensitivities being made, as necessary; and

(x) LOA Holder must submit a SFV Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of foundation installation activities and abide by the Plan if approved. At minimum, the SFV Plan must describe how LOA Holder would ensure that the first three monopile foundation installation sites selected for SFV measurements are representative of the rest of the monopile installation sites such that future pile installation events are anticipated to produce similar sound levels to those piles measured. In the case that these sites/scenarios are not determined to be representative of all other pile installation sites, LOA Holder must include information in the SFV Plan on how additional sites/scenarios would be selected for SFV measurements. The SFV Plan must also include methodology for collecting, analyzing, and preparing SFV measurement data for submission to NMFS Office of Protected Resources and describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. SFV for pile driving may not occur until NMFS approves the SFV Plan for this activity.

(16) LOA Holder must submit a Foundation Installation Pile Driving Marine Mammal Monitoring Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of pile driving and abide by the Plan if approved. LOA Holder must obtain both NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division's concurrence with this Plan prior to the start of any pile driving. The Plan must include a description of all monitoring equipment and PAM and PSO protocols (including number and location of PSOs) for all pile driving. No foundation pile installation can occur without NMFS' approval of the Plan; and

(17) LOA Holder must submit a Passive Acoustic Monitoring Plan (PAM Plan) to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of foundation installation activities (impact pile driving) and abide by the Plan if approved. The PAM Plan must include a description of all proposed PAM equipment, address how the proposed passive acoustic monitoring must follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind. The Plan must describe all proposed PAM equipment, procedures,

and protocols including proof that vocalizing North Atlantic right whales will be detected within the clearance and shutdown zones. No pile installation can occur if LOA Holder's PAM Plan does not receive approval from NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division.

(d) *Cofferdam and goal post installation and removal.* The following requirements apply to the installation and removal of cofferdams and goal posts at the cable landfall construction sites:

(1) Installation and removal of cofferdams and goal posts must not occur during nighttime hours (defined as the hours between 1.5 hours prior to civil sunset and 1 hour after civil sunrise);

(2) All installation and removal of sheet piles for cofferdams and casing pipes for goal posts must only occur for up to 12 hours for each cofferdam and up to 1 hour daily for each goal post (within a single 24-hour period);

(3) LOA Holder must establish and implement clearance zones for the installation and removal of cofferdams and goal posts using visual monitoring. These zones must be measured using the radial distance from the cofferdam and goal post being installed and/or removed;

(4) LOA Holder must utilize PSO(s), as described in § 217.265(d). At least two on-duty PSOs must monitor for marine mammals at least 30 minutes before, during, and 30 minutes after vibratory pile driving associated with cofferdam and casing pipe installation; and

(5) If a marine mammal is observed entering or within the respective shutdown zone after vibratory pile driving has begun, the PSO must call for a shutdown of vibratory pile driving. LOA Holder must stop vibratory pile driving immediately unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or if there is a risk of damage to the vessel that would create a risk of injury or loss of life for individuals or if the lead engineer determines there is refusal or instability. In any of these situations, LOA Holder must document the reason(s) for not shutting down and report the information to NMFS Office of Protected Resources in the next available weekly report (as described in § 217.265(h)).

(e) *UXO/MEC detonations.* The following requirements apply to all Unexploded Ordnances and Munitions and Explosives of Concern (UXO/MEC) detonations:

(1) Upon encountering an UXO/MEC, LOA Holder may only resort to high-order removal (*i.e.*, detonation) if all other means of removal are impracticable;

(2) LOA Holder may detonate a maximum of 10 UXO/MECs, of varying sizes but no larger than 1,000 pounds (lbs; 454 kilograms (kg)) charge weight (*i.e.*, E12), over the effective period of this rulemaking and LOA;

(3) LOA Holder must not detonate UXO/MECs from November 1 through April 31, annually;

(4) UXO/MEC detonations must only occur during daylight hours;

(5) No more than one detonation may occur within a 24-hour period;

(6) LOA Holder must establish and implement clearance zones for UXO/MEC detonation using both visual and acoustic monitoring, as described in paragraphs (c)(7), (8), and (12) through (14) of this section. UXO/MEC clearance zones are specific to the known charge weight size of the UXO/MEC to be detonated; if charge weight is unknown or uncertain then the largest zone size must be used;

(7) LOA Holder must utilize PSO(s) and PAM operator(s), as described in § 217.265(c). At least three PSOs on each of two dedicated PSO vessels must be used for all detonations with clearance zones less than 5 km (3.1 mi). If the clearance zone is larger than 5 km, at least one dedicated PSO vessel (with at least three on-duty PSOs) and an aerial platform (with at least two on-duty PSOs) must be used. Clearance zone size is measured using the radial distance from the UXO/MEC to be detonated;

(8) LOA Holder must utilize NMFS-approved PAM systems, as described in (c)(17) of this section.

(9) LOA Holder must deploy at least a double big bubble curtain during all UXO/MEC detonations. The bubble curtain must be deployed at a distance that avoids damage to the hose nozzles:

(i) Any bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 m³/(minute*m). The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column;

(ii) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(iii) No parts of the ring or other objects may prevent full seafloor contact with a bubble curtain ring;

(iv) Construction contractors must train personnel in the proper balancing

of airflow to the bubble curtain ring. LOA Holder must provide NMFS Office of Protected Resources with a bubble curtain performance test and maintenance report to review within 72 hours after each UXO/MEC is detonated. Additionally, a full maintenance check (*e.g.*, manually clearing holes) must occur prior to each UXO/MEC detonation;

(v) Corrections to the bubble ring(s) to meet the performance standards in this paragraph (e)(9) must occur prior to UXO/MEC detonation.

(10) LOA Holder must conduct SFV during all UXO/MEC detonations as described in paragraph (c)(15) of this section and deploy a pressure transducer;

(11) Clearance zones must be fully visible for at least 60 minutes and all marine mammal(s) must be confirmed to be outside of the clearance zone for at least 30 minutes prior to detonation. PAM must also be conducted for at least 60 minutes and the zone must be acoustically cleared during this time. If a marine mammal is observed entering or within the clearance zone prior to detonation, the activity must be delayed. Detonation may only commence if all marine mammals have been confirmed to have voluntarily left the clearance zones and been visually confirmed to be beyond the clearance zone, or when 60 minutes have elapsed without any redetections for whales (including the North Atlantic right whale) or 15 minutes have elapsed without any redetections of delphinids, harbor porpoises, or seals;

(12) For UXO/MEC detonations, LOA Holder must follow all measures described in paragraphs (c)(15) and § 217.264(c)(15)(i) through (vi), as well as the measures below:

(i) LOA Holder must not exceed modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds, assuming 10-dB attenuation, for UXO/MEC detonations. If any of the interim SFV measurement reports submitted for any UXO/MEC detonations indicate the modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds assuming 10-dB attenuation for future detonations will be exceeded, then LOA Holder must implement additional sound attenuation measures on all subsequent UXO/MEC detonations, including but not limited to the deployment of additional NAS to assist in achieving measurements in alignment with the modeled ranges. LOA Holder must also increase clearance zone sizes to those identified by NMFS until SFV measurements on UXO/MECs

demonstrate distances to harassment thresholds will be met or will be less than those modeled assuming 10 dB of attenuation. LOA Holder must optimize the sound attenuation systems (*e.g.*, ensure hose maintenance, pressure testing, *etc.*) to meet noise levels modeled, assuming 10 dB of attenuation, for UXO/MECs of the same charge weight or else no detonation activities must occur until NMFS and LOA Holder can evaluate the situation and ensure future UXO/MEC detonations must not exceed noise levels modeled, assuming 10-dB attenuation;

(ii) LOA Holder must submit a SFV Plan for UXO/MEC detonation to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of UXO/MEC detonation activities and abide by the Plan if approved. The SFV Plan must include methodology for collecting, analyzing, and preparing SFV measurement data for submission to NMFS Office of Protected Resources and describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. For recommended SFV protocols for UXO/MEC, please consult the National Physical Laboratory (NPL) *Protocol for In-Situ Underwater Measurement of Explosive Ordnance Disposal for UXO* (2020). SFV for UXO/MEC detonation cannot occur until NMFS approves the SFV Plan for this activity;

(iii) LOA Holder must submit a UXO/MEC Marine Mammal Monitoring Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of UXO/MEC detonation, respectively, and abide by the Plan if approved. LOA Holder must obtain both NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division's concurrence with this Plan prior to the start of any UXO/MEC detonations. The Plan must include a description of all monitoring equipment and PAM and PSO protocols (including number and location of PSOs) for all UXO/MEC detonations. The Plan must include final UXO/MEC detonation project design (*e.g.*, number and type of UXO/MECs, removal method(s), charge weight(s), anticipated start date, *etc.*) and all information related to PAM and PSO monitoring protocols for UXO/MEC activities. The Plan must detail all plans and procedures for sound attenuation as well as for monitoring marine mammals during all UXO/MEC detonations. No UXO/MEC detonations can occur without NMFS' approval of the Plan; and

(iv) LOA Holder must submit a Passive Acoustic Monitoring Plan (PAM Plan) to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of UXO/MEC detonations and abide by the Plan if approved. The PAM Plan must include a description of all proposed PAM equipment, address how the proposed passive acoustic monitoring must follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind. The Plan must describe all proposed PAM equipment, procedures, and protocols including proof that vocalizing North Atlantic right whales will be detected within the clearance and shutdown zones. No UXO/MEC detonations can occur if LOA Holder's PAM Plan does not receive approval from NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division.

(f) *HRG surveys.* The following requirements apply to HRG surveys operating sub-bottom profilers (SBPs) (*i.e.*, boomers, sparkers, and Compressed High Intensity Radiated Pulse (CHIRPS)):

(1) LOA Holder must establish and implement clearance and shutdown zones for HRG surveys using visual monitoring, as described in paragraph (c) of this section;

(2) LOA Holder must utilize PSO(s), as described in § 217.265(f);

(3) LOA Holder must abide by the relevant Project Design Criteria (PDCs 4, 5, and 7) of the programmatic consultation completed by NMFS' Greater Atlantic Regional Fisheries Office on June 29, 2021 (revised September 2021), pursuant to section 7 of the Endangered Species Act (ESA). To the extent that any relevant Best Management Practices (BMPs) described in these PDCs are more stringent than the requirements herein, those BMPs supersede these requirements;

(4) SBPs (hereinafter referred to as "acoustic sources") must be deactivated when not acquiring data or preparing to acquire data, except as necessary for testing. Acoustic sources must be used at the lowest practicable source level to meet the survey objective, when in use, and must be turned off when they are not necessary for the survey;

(5) LOA Holder is required to ramp-up acoustic sources prior to commencing full power, unless the equipment operates on a binary on/off switch, and ensure visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least

30 minutes immediately prior to the initiation of survey activities using acoustic sources specified in the LOA. Ramp-up and activation must be delayed if a marine mammal(s) enters its respective shutdown zone. Ramp-up and activation may only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species, has elapsed with no further sightings;

(6) Prior to a ramp-up procedure starting or activating acoustic sources, the acoustic source operator (operator) must notify a designated PSO of the planned start of ramp-up as agreed upon with the Lead PSO. The notification time should not be less than 60 minutes prior to the planned ramp-up or activation in order to allow the PSOs time to monitor the clearance zone(s) for 30 minutes prior to the initiation of ramp-up or activation (pre-start clearance). During this 30-minute pre-start clearance period, the entire applicable clearance zones must be visible, except as indicated in paragraph (f)(12) of this section;

(7) Ramp-ups must be scheduled so as to minimize the time spent with the source activated;

(8) A PSO conducting pre-start clearance observations must be notified again immediately prior to reinitiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed;

(9) LOA Holder must implement a 30-minute clearance period of the clearance zones immediately prior to the commencing of the survey or when there is more than a 30-minute break in survey activities or PSO monitoring. A clearance period is a period when no marine mammals are detected in the relevant zone;

(10) If a marine mammal is observed within a clearance zone during the clearance period, ramp-up or acoustic surveys may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until a specific time period has elapsed with no further sighting. The specific time period is 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species;

(11) In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (infrared (IR)/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.*, no delay is required) despite periods of inclement weather

and/or loss of daylight. Ramp-up may occur at times of poor visibility, including nighttime, if appropriate visual monitoring has occurred with no detections of marine mammals in the 30 minutes prior to beginning ramp-up;

(12) Once the survey has commenced, LOA Holder must shut down acoustic sources if a marine mammal enters a respective shutdown zone, except in cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.*, no shutdown is required) so long as no marine mammals have been detected. The shutdown requirement does not apply to small delphinids of the following genera: *Delphinus*, *Stenella*, *Lagenorhynchus*, and *Tursiops*. If there is uncertainty regarding the identification of a marine mammal species (*i.e.*, whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in this paragraph (f)(12) of this section is detected in the shutdown zone;

(13) If an acoustic source has been shut down due to the presence of a marine mammal, the use of an acoustic source may not commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting;

(14) LOA Holder must immediately shut down any acoustic source if a marine mammal is sighted entering or within its respective shutdown zones. If there is uncertainty regarding the identification of a marine mammal species (*i.e.*, whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in paragraph (f)(12) of this section is detected in the shutdown zone; and

(15) If an acoustic source is shut down for a period longer than 30 minutes, all clearance and ramp-up procedures must be initiated. If an acoustic source is shut down for reasons other than mitigation (*e.g.*, mechanical difficulty) for less than 30 minutes, acoustic sources may be activated again without ramp-up only if PSOs have maintained constant

observation and no additional detections of any marine mammal occurred within the respective shutdown zones.

(g) *Fisheries monitoring surveys.* The following measures apply to fishery monitoring surveys:

(1) Survey gear must be deployed as soon as possible once the vessel arrives on station. Gear must not be deployed if there is a risk of interaction with marine mammals. Gear may be deployed after 15 minutes of no marine mammal sightings within 1 nautical mile (nmi; 1,852 m) of the sampling station;

(2) LOA Holder and/or its cooperating institutions, contracted vessels, or commercially hired captains must implement the following “move-on” rule: If marine mammals are sighted within 1 nmi of the planned location and 15 minutes before gear deployment, then LOA Holder and/or its cooperating institutions, contracted vessels, or commercially hired captains, as appropriate, must move the vessel away from the marine mammal to a different section of the sampling area. If, after moving on, marine mammals are still visible from the vessel, LOA Holder and its cooperating institutions, contracted vessels, or commercially hired captains must move again or skip the station;

(3) If a marine mammal is deemed to be at risk of interaction after the gear is deployed or set, all gear must be immediately removed from the water. If marine mammals are sighted before the gear is fully removed from the water, the vessel must slow its speed and maneuver the vessel away from the animals to minimize potential interactions with the observed animal;

(4) LOA Holder must maintain visual marine mammal monitoring effort during the entire period of time that gear is in the water (*i.e.*, throughout gear deployment, fishing, and retrieval);

(5) All fisheries monitoring gear must be fully cleaned and repaired (if damaged) before each use/deployment;

(6) LOA Holder's fixed gear must comply with the Atlantic Large Whale Take Reduction Plan regulations at 50 CFR 229.32 during fisheries monitoring surveys;

(7) Trawl tows must be limited to a maximum of a 20-minute trawl time at 3.0 kn;

(8) All gear must be emptied as close to the deck/sorting area and as quickly as possible after retrieval;

(9) During trawl surveys, vessel crew must open the codend of the trawl net close to the deck in order to avoid injury to animals that may be caught in the gear;

(10) Baited remote underwater video (BRUV) sampling must limit soak duration to 60 minutes or less, BRUVs must use a weighted line attached to surface and subsurface buoys that must hold a stereo-camera system in the water column and a system at the seafloor, and the vessel must remain on location with the gear while it is in use;

(11) Each chevron trap must have a vertical buoy line and must limit soak duration to 90 minutes or less;

(12) All fishery survey-related lines must include the breaking strength of all lines being less than 1,700 pounds (lbs; 771 kilograms (kg)). This may be accomplished by using whole buoy line that has a breaking strength of 1,700 lbs; or buoy line with weak inserts that result in line having an overall breaking strength of 1,700 lbs;

(13) During any survey that uses vertical lines, buoy lines must be weighted and must not float at the surface of the water and all groundlines must consist of sinking lines. All groundlines must be composed entirely of sinking lines. Buoy lines must utilize weak links. Weak links must break cleanly leaving behind the bitter end of the line. The bitter end of the line must be free of any knots when the weak link breaks. Splices are not considered to be knots. The attachment of buoys, toggles, or other floatation devices to groundlines is prohibited;

(14) All in-water survey gear, including buoys, must be properly labeled with the scientific permit number or identification as LOA Holder's research gear. All labels and markings on the gear, buoys, and buoy lines must also be compliant with the applicable regulations, and all buoy markings must comply with instructions received by the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division;

(15) All survey gear must be removed from the water whenever not in active survey use (*i.e.*, no wet storage); and

(16) All reasonable efforts, that do not compromise human safety, must be undertaken to recover gear.

§ 217.265 Monitoring and reporting requirements.

(a) *Protected species observer (PSO) and passive acoustic monitoring (PAM) operator qualifications.* LOA Holder must implement the following measures applicable to PSOs and PAM operators:

(1) LOA Holder must use independent, NMFS-approved PSOs and PAM operators, meaning that the PSOs and PAM operators must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect

data, and communicate with and instruct relevant crew with regard to the presence of protected species and mitigation requirements;

(2) All PSOs and PAM operators must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO or PAM operator has acquired the relevant skills through a suitable amount of alternate experience. Requests for such a waiver must be submitted to NMFS Office of Protected Resources and must include written justification containing alternate experience. Alternate experience that may be considered includes, but is not limited to: previous work experience conducting academic, commercial, or government-sponsored marine mammal visual and/or acoustic surveys; or previous work experience as a PSO/PAM operator;

(3) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the target size and distance (binocular use is allowable); ability to conduct field observations and collect data according to the assigned protocols; sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations; writing skills sufficient to document observations, including but not limited to, the number and species of marine mammals observed, the dates and times of when in-water construction activities were conducted, the dates and time when in-water construction activities were suspended to avoid potential incidental take of marine mammals from construction noise within a defined shutdown zone, and marine mammal behavior; and the ability to communicate orally, by radio, or in-person, with project personnel to provide real-time information on marine mammals observed in the area;

(4) All PSOs must be trained in northwestern Atlantic Ocean marine mammal identification and behaviors and must be able to conduct field observations and collect data according to assigned protocols. Additionally, PSOs must have the ability to work with all required and relevant software and equipment necessary during observations (as described in paragraphs (b)(6) and (b)(7) of this section);

(5) All PSOs and PAM operators must successfully complete a relevant

training course within the last 5 years, including obtaining a certificate of course completion;

(6) PSOs and PAM operators are responsible for obtaining NMFS' approval. NMFS may approve PSOs and PAM operators as conditional or unconditional. A conditionally-approved PSO or PAM operator may be one who has completed training in the last 5 years but has not yet attained the requisite field experience. An unconditionally approved PSO or PAM operator is one who has completed training within the last 5 years and attained the necessary experience (*i.e.*, demonstrate experience with monitoring for marine mammals at clearance and shutdown zone sizes similar to those produced during the respective activity). Lead PSO or PAM operators must be unconditionally approved and have a minimum of 90 days in an northwestern Atlantic Ocean offshore environment performing the role (either visual or acoustic), with the conclusion of the most recent relevant experience not more than 18 months previous. A conditionally approved PSO or PAM operator must be paired with an unconditionally approved PSO or PAM operator;

(7) PSOs for cable landfall construction (*i.e.*, vibratory pile installation and removal) and HRG surveys may be unconditionally or conditionally approved. PSOs and PAM operators for foundation installation and UXO/MEC activities must be unconditionally approved;

(8) At least one on-duty PSO and PAM operator, where applicable, for each activity (*e.g.*, impact pile driving, vibratory pile driving, UXO/MEC detonation activities, and HRG surveys) must be designated as the Lead PSO or Lead PAM operator;

(9) LOA Holder must submit NMFS previously approved PSOs and PAM operators to NMFS Office of Protected Resources for review and confirmation of their approval for specific roles at least 30 days prior to commencement of the activities requiring PSOs/PAM operators or 15 days prior to when new PSOs/PAM operators are required after activities have commenced;

(10) For prospective PSOs and PAM operators not previously approved, or for PSOs and PAM operators whose approval is not current, LOA Holder must submit resumes for approval at least 60 days prior to PSO and PAM operator use. Resumes must include information related to relevant education, experience, and training, including dates, duration, location, and description of prior PSO or PAM operator experience. Resumes must be

accompanied by relevant documentation of successful completion of necessary training;

(11) PAM operators are responsible for obtaining NMFS approval. To be approved as a PAM operator, the person must meet the following qualifications: The PAM operator must demonstrate that they have prior experience with real-time acoustic detection systems and/or have completed specialized training for operating PAM systems and detecting and identifying Atlantic Ocean marine mammals sounds, in particular: North Atlantic right whale sounds, humpback whale sounds, and how to deconflict them from similar North Atlantic right whale sounds, and other co-occurring species' sounds in the area including sperm whales; must be able to distinguish between whether a marine mammal or other species sound is detected, possibly detected, not detected and similar terminology must be used across companies/projects; where localization of sounds or deriving bearings and distance are possible, the PAM operators need to have demonstrated experience in using this technique; PAM operators must be independent observers (*i.e.*, not construction personnel); PAM operators must demonstrate experience with relevant acoustic software and equipment; PAM operators must have the qualifications and relevant experience/training to safely deploy and retrieve equipment and program the software, as necessary; PAM operators must be able to test software and hardware functionality prior to operation; and PAM operators must have evaluated their acoustic detection software using the PAM Atlantic baleen whale annotated data set available at National Centers for Environmental Information (NCEI) and provide evaluation/performance metric;

(12) PAM operators must be able to review and classify acoustic detections in real-time (prioritizing North Atlantic right whales and noting detection of other cetaceans) during the real-time monitoring periods;

(13) PSOs may work as PAM operators and vice versa, pending NMFS-approval; however, they may only perform one role at any one time and must not exceed work time restrictions, which must be tallied cumulatively; and

(14) All PSOs and PAM operators must complete a Permits and Environmental Compliance Plan training and a 2-day refresher session that must be held with the PSO provider and Project compliance representative(s) prior to the start of in-water project activities (*e.g.*, HRG survey, foundation

installation, cable landfall activities, UXO/MEC detonations, *etc.*).

(b) *General PSO and PAM operator requirements.* The following measures apply to PSOs and PAM operators and must be implemented by LOA Holder:

(1) PSOs must monitor for marine mammals prior to, during, and following impact pile driving, vibratory pile driving, UXO/MEC detonation activities, and HRG surveys that use sub-bottom profilers (with specific monitoring durations and needs described in paragraphs (c) through (f) of this section, respectively). Monitoring must be done while free from distractions and in a consistent, systematic, and diligent manner;

(2) For foundation installation and UXO/MEC detonation, PSOs must visually clear (*i.e.*, confirm no observations of marine mammals) the entire minimum visibility zone for a full 30 minutes immediately prior to commencing activities. For cable landfall activities (*e.g.*, cofferdams and goal posts) and HRG surveys, which do not have a minimum visibility zone, the entire clearance zone must be visually cleared and as much of the Level B harassment zone as possible;

(3) All PSOs must be located at the best vantage point(s) on any platform, as determined by the Lead PSO, in order to obtain 360-degree visual coverage of the entire clearance and shutdown zones around the activity area, and as much of the Level B harassment zone as possible. PAM operators may be located on a vessel or remotely on-shore, the PAM operator(s) must assist PSOs in ensuring full coverage of the clearance and shutdown zones. The PAM operator must monitor to and past the clearance zone for large whales;

(4) All on-duty PSOs must remain in real-time contact with the on-duty PAM operator(s), PAM operators must immediately communicate all acoustic detections of marine mammals to PSOs, including any determination regarding species identification, distance, and bearing (where relevant) relative to the pile being driven and the degree of confidence (*e.g.*, possible, probable detection) in the determination. All on-duty PSOs and PAM operator(s) must remain in contact with the on-duty construction personnel responsible for implementing mitigations (*e.g.*, delay to pile driving or UXO/MEC detonation) to ensure communication on marine mammal observations can easily, quickly, and consistently occur between all on-duty PSOs, PAM operator(s), and on-water Project personnel;

(5) The PAM operator must inform the Lead PSO(s) on duty of animal detections approaching or within

applicable ranges of interest to the activity occurring via the data collection software system (*i.e.*, Mysticetus or similar system) who must be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.*, delay);

(6) PSOs must use high magnification (25x) binoculars, standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. During foundation installation and UXO/MEC detonations, at least two PSOs on the pile driving and detonation-dedicated PSO vessel must be equipped with functional Big Eye binoculars (*e.g.*, 25 x 150; 2.7 view angle; individual ocular focus; height control); these must be pedestal mounted on the deck at the best vantage point that provides for optimal sea surface observation and PSO safety. PAM operators must have the appropriate equipment (*i.e.*, a computer station equipped with a data collection software system available wherever they are stationed) and use a NMFS-approved PAM system to conduct monitoring. PAM systems are approved through the PAM Plan as described in § 217.264(c)(17);

(7) During periods of low visibility (*e.g.*, darkness, rain, fog, poor weather conditions, *etc.*), PSOs must use alternative technology (*i.e.*, infrared or thermal cameras) to monitor the clearance and shutdown zones as approved by NMFS; and

(8) PSOs and PAM operators must not exceed 4 consecutive watch hours on duty at any time, must have a 2-hour (minimum) break between watches, and must not exceed a combined watch schedule of more than 12 hours in a 24-hour period. If the schedule includes PSOs and PAM operators on-duty for 2-hour shifts, a minimum 1-hour break between watches must be allowed.

(c) *PSO and PAM operator requirements during WTG and OSS foundation installation and UXO/MEC detonations.* The following measures apply to PSOs and PAM operators during WTG and OSS foundation installation and UXO/MEC detonations and must be implemented by LOA Holder:

(1) PSOs and PAM operator(s), using a NMFS-approved PAM system, must monitor for marine mammals 60 minutes prior to, during, and 30 minutes following all pile-driving and UXO/MEC detonation activities. If PSOs cannot visually monitor the minimum visibility zone prior to impact pile driving or the clearance zone prior to any UXO/MEC detonation at all times using the equipment described in

paragraphs (b)(6) and (7) of this section, pile-driving operations or UXO/MEC detonation must not commence or must shutdown if they are currently active;

(2) At least three on-duty PSOs must be stationed and observing from the activity platform during impact pile driving or UXO/MEC detonation and at least three on-duty PSOs must be stationed on each dedicated PSO vessel. If an aerial platform is required or used (per § 217.264(e)(7)), at least two on-duty PSOs must be actively searching for marine mammals. Concurrently, at least one PAM operator per acoustic data stream (equivalent to the number of acoustic buoys) must be actively monitoring for marine mammals 60 minutes before, during, and 30 minutes after impact pile driving or UXO/MEC detonation in accordance with a NMFS-approved PAM Plan;

(3) LOA Holder must conduct PAM for at least 24 hours immediately prior to pile driving or UXO/MEC detonation activities. The PAM operator must review all detections from the previous 24-hour period immediately prior to pile driving and UXO/MEC detonation activities.

(d) *PSO requirements during cofferdam and goal post installation and removal.* The following measures apply to PSOs during cofferdam and goal post installation and removal and must be implemented by LOA Holder:

(1) At least two PSOs must be on active duty during all activities related to the installation and removal of cofferdams and goal posts; and

(2) PSOs must monitor the clearance zone for the presence of marine mammals for 30 minutes before, throughout the installation of the sheet piles (and casing pipe, if installed), and for 30 minutes after all vibratory pile driving activities have ceased. Sheet pile or casing pipe installation must only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of vibratory pile driving.

(e) *PSO requirements during HRG surveys.* The following measures apply to PSOs during HRG surveys using acoustic sources that have the potential to result in harassment and must be implemented by LOA Holder:

(1) Between four and six PSOs must be present on every 24-hour survey vessel and two to three PSOs must be present on every 12-hour survey vessel;

(2) At least one PSO must be on active duty monitoring during HRG surveys conducted during daylight (*i.e.*, from 30 minutes prior to civil sunrise through 30

minutes following civil sunset) and at least two PSOs must be on activity duty monitoring during HRG surveys conducted at night;

(3) PSOs on HRG vessels must begin monitoring 30 minutes prior to activating acoustic sources, during the use of these acoustic sources, and for 30 minutes after use of these acoustic sources has ceased;

(4) Any observations of marine mammals must be communicated to PSOs on all nearby survey vessels during concurrent HRG surveys; and

(5) During daylight hours when survey equipment is not operating, LOA Holder must ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources. Off-effort PSO monitoring must be reflected in the monthly PSO monitoring reports.

(f) *Monitoring requirements during fisheries monitoring surveys.* The following measures apply during fisheries monitoring surveys and must be implemented by LOA Holder:

(1) All captains and crew conducting fishery surveys must be trained in marine mammal detection and identification; and

(2) Marine mammal monitoring must be conducted within 1 nmi from the planned survey location by the trained captain and/or a member of the scientific crew for 15 minutes prior to deploying gear, throughout gear deployment and use, and for 15 minutes after haul back.

(g) *Reporting.* LOA Holder must comply with the following reporting measures:

(1) Prior to initiation of any on-water project activities, LOA Holder must demonstrate in a report submitted to NMFS Office of Protected Resources that all required training for LOA Holder personnel (including the vessel crews, vessel captains, PSOs, and PAM operators) has been completed.

(2) LOA Holder must use a standardized reporting system during the effective period of the LOA. All data collected related to the Project must be recorded using industry-standard software that is installed on field laptops and/or tablets. Unless stated otherwise, all reports must be submitted to NMFS Office of Protected Resources (PR.ITP.MonitoringReports@noaa.gov), dates must be in MM/DD/YYYY format, and location information must be provided in Decimal Degrees and with the coordinate system information (*e.g.*, NAD83, WGS84, *etc.*).

(3) For all visual monitoring efforts and marine mammal sightings, the following information must be collected

and reported to NMFS Office of Protected Resources: the date and time that monitored activity begins or ends; the construction activities occurring during each observation period; the watch status (*i.e.*, sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform); the PSO who sighted the animal; the time of sighting; the weather parameters (*e.g.*, wind speed, percent cloud cover, visibility); the water conditions (*e.g.*, Beaufort sea state, tide state, water depth); all marine mammal sightings, regardless of distance from the construction activity; species (or lowest possible taxonomic level possible); the pace of the animal(s); the estimated number of animals (minimum/maximum/high/low/best); the estimated number of animals by cohort (*e.g.*, adults, yearlings, juveniles, calves, group composition, *etc.*); the description (*i.e.*, as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics); the description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of behavioral responses thought to have resulted from the specific activity; the animal's closest distance and bearing from the pile being driven or specified HRG equipment and estimated time entered or spent within the Level A harassment and/or Level B harassment zone(s); the activity at time of sighting (*e.g.*, vibratory installation/removal, impact pile driving, construction survey), use of any noise attenuation device(s), and specific phase of activity (*e.g.*, ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, *etc.*); the marine mammal occurrence in Level A harassment or Level B harassment zones; the description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.*, delay, shutdown, *etc.*) and time and location of the action; other human activity in the area, and; other applicable information, as required in any LOA issued under § 217.266.

(4) LOA Holder must compile and submit weekly reports during foundation installation to NMFS Office of Protected Resources that document the daily start and stop of all pile driving associated with the Project; the start and stop of associated observation periods by PSOs; details on the deployment of PSOs; a record of all

detections of marine mammals (acoustic and visual); any mitigation actions (or if mitigation actions could not be taken, provide reasons why); and details on the noise attenuation system(s) used and its performance. Weekly reports are due on Wednesday for the previous week (Sunday to Saturday) and must include the information required under this section. The weekly report must also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is completed, weekly reports are no longer required by LOA Holder.

(5) LOA Holder must compile and submit monthly reports to NMFS Office of Protected Resources during foundation installation that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, MMIS number, and route), number of piles installed, all detections of marine mammals, and any mitigative action taken. Monthly reports are due on the 15th of the month for the previous month. The monthly report must also identify which turbines become operational and when (a map must be provided). Full PAM detection data and metadata must also be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic Right Whale Passive Acoustic Reporting System website at <https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates>.

(6) LOA Holder must submit a draft annual report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year. LOA Holder must provide a final report within 30 days following resolution of NMFS' comments on the draft report. The draft and final reports must detail the following: the total number of marine mammals of each species/stock detected and how many were within the designated Level A harassment and Level B harassment zone(s) with comparison to authorized take of marine mammals for the associated activity type; marine mammal detections and behavioral observations before, during, and after each activity; what mitigation measures were implemented (*i.e.*, number of shutdowns or clearance zone delays, *etc.*) or, if no mitigative actions was taken, why not; operational details (*i.e.*, days and duration of impact and vibratory pile driving, days and number of UXO/MEC detonations, days and amount of HRG survey effort, *etc.*); any

PAM systems used; the results, effectiveness, and which noise attenuation systems were used during relevant activities (*i.e.*, impact pile driving, and UXO/MEC detonations); summarized information related to situational reporting; and any other important information relevant to the Project, including additional information that may be identified through the adaptive management process.

(7) LOA Holder must submit its draft 5-year report to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted within 90 calendar days of the completion of activities occurring under the LOA. A 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS Office of Protected Resources comments on the draft report. If no comments are received from NMFS Office of Protected Resources within 60 calendar days of NMFS Office of Protected Resources receipt of the draft report, the report shall be considered final.

(8) For those foundation piles and UXO/MEC detonations requiring SFV measurements, LOA Holder must provide the initial results of the SFV measurements to NMFS Office of Protected Resources in an interim report after each foundation installation event and each UXO/MEC detonation event as soon as they are available and prior to a subsequent detonation or foundation installation, but no later than 48 hours after each completed foundation installation event and 48 hours after a detonation. The report must include, at minimum: hammer energies/schedule used during pile driving, including, the total number of strikes and the maximum hammer energy; the model-estimated acoustic ranges ($R_{95\%}$) to compare with the real-world sound field measurements; the estimated UXO/MEC charge size (or physical size if charge size is unknown) and donor charge size in trinitrotoluene (TNT) equivalent weight for either high (donor charge used to detonate/destroy UXO/MEC) or low order (*e.g.*, deflagration where donor charge disrupts/consumes UXO/MEC) detonations and description of UXO/MEC (*e.g.*, munition type, state of submergence, approximate age); peak sound pressure level (SPL_{pk}), root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), and sound exposure level (SEL, in single strike for pile driving, SEL_{ss}), for each hydrophone, including at least the maximum, arithmetic mean, minimum, median (L50) and L5 (95 percent exceedance) statistics for each metric; estimated

marine mammal Level A harassment and Level B harassment acoustic isopleths, calculated using the maximum-over-depth L5 (95 percent exceedance level, maximum of both hydrophones) of the associated sound metric; comparison of modeled results assuming 10-dB attenuation against the measured marine mammal Level A harassment and Level B harassment acoustic isopleths; estimated transmission loss coefficients; pile identifier name, location of the pile and UXO/MEC and each hydrophone array in latitude/longitude; depths of each hydrophone; one-third-octave band single strike SEL spectra; if filtering is applied, full filter characteristics must be reported; and hydrophone specifications including the type, model, and sensitivity. LOA Holder must also report any immediate observations which are suspected to have a significant impact on the results including but not limited to: observed noise mitigation system issues, obstructions along the measurement transect, and technical issues with hydrophones or recording devices. If any *in-situ* calibration checks for hydrophones reveal a calibration drift greater than 0.75 dB, pistonphone calibration checks are inconclusive, or calibration checks are otherwise not effectively performed, LOA Holder must indicate full details of the calibration procedure, results, and any associated issues in the 48-hour interim reports.

(9) The final results of SFV measurements from each foundation installation and each UXO/MEC detonation must be submitted as soon as possible, but no later than 90 days following completion of each event's SFV measurements. The final reports must include all details prescribed above for the interim report as well as, at minimum, the following: the peak sound pressure level (SPL_{pk}), the root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), the single strike sound exposure level (SEL_{ss}), the integration time for SPL_{rms} , the spectrum, and the 24-hour cumulative SEL extrapolated from measurements at all hydrophones. The final report must also include at least the maximum, mean, minimum, median (L_{50}) and L_5 (95 percent exceedance) statistics for each metric; the SEL and SPL power spectral density and/or one-third octave band levels (usually calculated as decade band levels) at the receiver locations should be reported; the sound levels reported must be in median, arithmetic mean, and L_5 (95 percent exceedance) (*i.e.*, average in linear space), and in dB;

range of TL coefficients; the local environmental conditions, such as wind speed, transmission loss data collected on-site (or the sound velocity profile); baseline pre- and post-activity ambient sound levels (broadband and/or within frequencies of concern); a description of depth and sediment type, as documented in the Construction and Operation Plan (COP), at the recording and foundation installation and UXO/MEC detonation locations; the extents of the measured Level A harassment and Level B harassment zone(s); hammer energies required for pile installation and the number of strikes per pile; the charge weights and other relevant characteristics of UXO/MEC detonations; the hydrophone equipment and methods (*i.e.*, recording device, bandwidth/sampling rate; distance from the pile and UXO/MEC where recordings were made; the depth of recording device(s)); a description of the SFV measurement hardware and software, including software version used, calibration data, bandwidth capability and sensitivity of hydrophone(s), any filters used in hardware or software, any limitations with the equipment, and other relevant information; the spatial configuration of the noise attenuation device(s) relative to the pile and UXO/MEC charge; a description of the noise abatement system and operational parameters (*e.g.*, bubble flow rate, distance deployed from the pile and/or UXO/MEC, *etc.*), and any action taken to adjust the noise abatement system. A discussion which includes any observations which are suspected to have a significant impact on the results including but not limited to: observed noise mitigation system issues, obstructions along the measurement transect, and technical issues with hydrophones or recording devices.

(10) If at any time during the project LOA Holder becomes aware of any issue or issues which may (to any reasonable subject-matter expert, including the persons performing the measurements and analysis) call into question the validity of any measured Level A harassment or Level B harassment isopleths to a significant degree, which were previously transmitted or communicated to NMFS Office of Protected Resources, LOA Holder must inform NMFS Office of Protected Resources within 1 business day of becoming aware of this issue or before the next pile is driven (or UXO/MEC is detonated), whichever comes first.

(11) If a North Atlantic right whale is acoustic detected at any time by a project-related PAM system, LOA Holder must ensure the detection is

reported as soon as possible to NMFS, but no longer than 24 hours after the detection via the 24-hour North Atlantic right whale Detection Template (<https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates>). Calling the hotline is not necessary when reporting PAM detections via the template;

(12) Full detection data, metadata, and location of recorders (or GPS tracks, if applicable) from all real-time hydrophones used for monitoring during construction must be submitted within 90 calendar days following completion of activities requiring PAM for mitigation via the ISO standard metadata forms available on the NMFS Passive Acoustic Reporting System website (<https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates>). Submit the completed data templates to nmfs.nec.pacmdata@noaa.gov. The full acoustic recordings from real-time systems must also be sent to the National Centers for Environmental Information (NCEI) for archiving within 90 days following completion of activities requiring PAM for mitigation. Submission details can be found at: <https://www.ncei.noaa.gov/products/passive-acoustic-data>;

(13) LOA Holder must submit situational reports if the following circumstances occur (including all instances wherein an exemption is taken must be reported to NMFS Office of Protected Resources within 24 hours):

(i) If a North Atlantic right whale is observed at any time by PSOs or project personnel, LOA Holder must ensure the sighting is immediately (if not feasible, as soon as possible and no longer than 24 hours after the sighting) reported to NMFS and the Right Whale Sightings Advisory System (RWSAS). If in the Northeast Region (Maine to Virginia/North Carolina border) call (866-755-6622). If in the Southeast Region (North Carolina to Florida) call (877-WHALE-HELP or 877-942-5343). If calling NMFS is not possible, reports can also be made to the U.S. Coast Guard via channel 16 or through the WhaleAlert app (<http://www.whalealert.org/>). The sighting report must include the time, date, and location of the sighting, number of whales, animal description/certainty of sighting (provide photos/video if taken), Lease Area/project name, PSO/personnel name, PSO provider company (if applicable), and reporter's contact information.

(ii) If a North Atlantic right whale is observed at any time by PSOs or project personnel, LOA Holder must submit a summary report to NMFS Greater

Atlantic Regional Fisheries (GARFO; *nmfs.gar.incidental-take@noaa.gov*), NMFS Office of Protected Resources, and NMFS Northeast Fisheries Science Center (NEFSC; *ne.rw.survey@noaa.gov*) within 24 hours with the above information and the vessel/platform from which the sighting was made, activity the vessel/platform was engaged in at time of sighting, project construction and/or survey activity at the time of the sighting (e.g., pile driving, cable installation, HRG survey), distance from vessel/platform to sighting at time of detection, and any mitigation actions taken in response to the sighting.

(iii) If an observation of a large whale occurs during vessel transit, LOA Holder must report the time, date, and location of the sighting; the vessel's activity, heading, and speed (knots); Beaufort sea state, water depth (meters), and visibility conditions; marine mammal species identification to the best of the observer's ability and any distinguishing characteristics; initial distance and bearing to marine mammal from vessel and closest point of approach; and any avoidance measures taken in response to the marine mammal sighting.

(iv) LOA Holder must provide NMFS Office of Protected Resources with notification of planned UXO/MEC detonation as soon as possible but at least 48 hours prior to the planned detonation, unless this 48-hour notification would create delays to the detonation that would result in imminent risk of human life or safety. This notification must include the coordinates of the planned detonation, the estimated charge size, and any other information available on the characteristics of the UXO/MEC. If an UXO/MEC detonation occurs, within 72 hours after a detonation but before the next detonation, whichever is sooner, LOA Holder must report to NMFS Office of Protected Resources the time, date, location (latitude/longitude Decimal Degrees), charge weight size, justification on why detonation was necessary and other means of removal or avoidance could not occur, all detections of marine mammals within the UXO/MEC zones, and any mitigative action taken.

(v) In the event that personnel involved in the Project discover a stranded, entangled, injured, or dead marine mammal, LOA Holder must immediately report the observation to NMFS. If in the Greater Atlantic Region (Maine to Virginia) call the NMFS Greater Atlantic Stranding Hotline (866-755-6622); if in the Southeast Region (North Carolina to Florida), call the

NMFS Southeast Stranding Hotline (877-942-5343). Separately, LOA Holder must report the incident to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*) and, if in the Greater Atlantic region (Maine to Virginia), NMFS Greater Atlantic Regional Fisheries Office (GARFO; *nmfs.gar.incidental-take@noaa.gov*, *nmfs.gar.stranding@noaa.gov*) or, if in the Southeast region (North Carolina to Florida), NMFS Southeast Regional Office (SERO; *secmammalreports@noaa.gov*) as soon as feasible. The report (via phone or email) must include contact (name, phone number, etc.), the time, date, and location of the first discovery (and updated location information if known and applicable); Species identification (if known) or description of the animal(s) involved; condition of the animal(s) (including carcass condition if the animal is dead); observed behaviors of the animal(s), if alive; if available, photographs or video footage of the animal(s); and general circumstances under which the animal was discovered.

(vi) In the event of a vessel strike of a marine mammal by any vessel associated with the Project or if project activities cause a non-auditory injury or death of a marine mammal, LOA Holder must immediately report the incident to NMFS. If in the Greater Atlantic Region (Maine to Virginia) call the NMFS Greater Atlantic Stranding Hotline (866-755-6622) and if in the Southeast Region (North Carolina to Florida) call the NMFS Southeast Stranding Hotline (877-942-5343). Separately, LOA Holder must immediately report the incident to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*) and, if in the Greater Atlantic region (Maine to Virginia), NMFS GARFO (*nmfs.gar.incidental-take@noaa.gov*, *nmfs.gar.stranding@noaa.gov*) or, if in the Southeast region (North Carolina to Florida), NMFS SERO (*secmammalreports@noaa.gov*). The report must include the time, date, and location of the incident; species identification (if known) or description of the animal(s) involved; vessel size and motor configuration (inboard, outboard, jet propulsion); vessel's speed leading up to and during the incident; vessel's course/heading and what operations were being conducted (if applicable); status of all sound sources in use; description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike; environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud

cover, visibility) immediately preceding the strike; estimated size and length of animal that was struck; description of the behavior of the marine mammal immediately preceding and following the strike; if available, description of the presence and behavior of any other marine mammals immediately preceding the strike; estimated fate of the animal (e.g., dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and to the extent practicable, photographs or video footage of the animal(s). LOA Holder must immediately cease all on-water activities until the NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. LOA Holder may not resume their activities until notified by NMFS Office of Protected Resources.

(14) LOA Holder must report any lost gear associated with the fishery surveys to the NMFS GARFO Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

§ 217.266 Letter of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, LOA Holder must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed October 12, 2028, the expiration date of this subpart.

(c) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, LOA Holder must apply for and obtain a modification of the LOA as described in § 217.267.

(d) The LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(e) Issuance of the LOA must be based on a determination that the level of taking must be consistent with the findings made for the total taking

allowable under the regulations of this subpart.

(f) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.267 Modifications of Letter of Authorization.

(a) An LOA issued under §§ 217.262 and 217.266 or this section for the activity identified in § 217.260(a) shall be modified upon request by LOA Holder, provided that:

(1) The specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For a LOA modification request by the applicant that includes changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), the LOA shall be modified, provided that:

(1) NMFS Office of Protected Resources determines that the changes to the activity or the mitigation, monitoring, or reporting do not change the findings made for the regulations in this subpart and do not result in more than a minor change in the total estimated number of takes (or distribution by species or years), and

(2) NMFS Office of Protected Resources may, if appropriate, publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 217.262 and 217.266 or this section for the activities identified in § 217.260(a) may be modified by NMFS Office of Protected Resources under the following circumstances:

(1) Through adaptive management, NMFS Office of Protected Resources may modify (including delete, modify, or add to) the existing mitigation, monitoring, or reporting measures (after consulting with LOA Holder regarding the practicability of the modifications), if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting

measures in an LOA include, but are not limited to:

(A) Results from LOA Holder's monitoring(s);

(B) Results from other marine mammals and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by the regulations in this subpart or subsequent LOA.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS Office of Protected Resources shall publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS Office of Protected Resources determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in the LOA issued pursuant to §§ 217.262 and 217.266 or this section, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 217.268–217.269 [Reserved]

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